Dec. 22. Postponed.
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SUPREME COURT OF THE UNITED STATES.

No. 270.

JAMES L. WITHERSPOON, JAMES E. M. BARKMAN and THOMAS D. KINGSBERRY, Executors of HENRY K. HARDY, Plaintiffs in Error,

vs.

BENJAMIN S. DUNCAN and HARRIS FLANAGIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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THE UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF ARKANSAS. } *sct.*

The President of the United States of America, to the Judges of the Supreme Court of the State of Arkansas, greeting:

Because, in the and proceedings in the judgment in a plea or appeal which is in the said Supreme Court of the State of Arkansas, before you, between James L. Witherspoon, James E. M. Barkman and Thomas D. Kingsberry, as executors of Henry K. Hardy, appellants, and Benjamin S. Duncan and Harris Flanagin, defendant's appellees, a manifest error has happened to the great damages of the said James L. Witherspoon, et als., as executors of William K. Hardy, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein granted, that then under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

[SEAL.] Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this 20th day of June, A. D. 1860, and the year of American Independence the eighty-fourth.

Attest, RICHARD SEARCY *Clerk.*

Allowed June 21st, 1860.

E. H. ENGLISH
Chief Justice Supreme Court, Arkansas.

State of Arkansas, }
In the Supreme Court. }

I, Luke E. Barber, clerk of the Supreme Court of said State, hereby certify that, in obedience to the mandate of this writ of error and the allowance thereof by the Chief Justice of said Court, I have made and certified a full and true transcript of the

record of the case therein mentioned, except as in the certificate thereof is excepted, which is hereto attached.

In testimony whereof, I hereto set my hand as clerk of said Court, and affix the seal of said Court at my [SEAL.] office in the city of Little Rock, this 10th day of October, A. D. 1860.

L. E. BARBER,
Clerk Supreme Court, Arkansas.

State of Arkansas, *sct.*

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House in the city of Little Rock on the first Monday in May, A. D. 1860, the following proceedings were had on the 16th day of June, 1860, of said term, before the Hon. Elbert H. English, Chief Justice, and the Hon. Freeman W. Compton, Judge of said Court, in the case of

James L. Witherspoon, *et al.*, Executors, &c., Appellants,
vs.
Benjamin S. Duncan, *et al.*, Appellees.

Appeal from Clark Circuit Court, in Chancery.

Be it remembered, that heretofore, to wit, on the 26th day of June, A. D. 1857, the said appellants filed in the office of the clerk of this Court the transcript of the record of said Circuit Court in this cause, which is in the following words:

Transfer of Circuit Court.

"Pleas before the Hon. Abner A. Stith, Judge of the Sixth Judicial Circuit of the State of Arkansas, of which the county of Clark forms a part, on the 21st day of March, A. D. 1856.

Henry K. Hardy, Plaintiff,
vs.
Benjamin S. Duncan and Harris Flanagin, Defendants.

Bill in Chancery.

Be it remembered, that on the 20th day of March, A. D. 1856, the plaintiff in the above entitled suit filed in the office of the clerk of the Clark Circuit Court his declaration in the above case, in the words and figures following, to wit:

State of Arkansas, } to wit.
County of Clark. }

Bill of Complaint.

In the Circuit Court of Clark county on the chancery side thereof, to the September term thereof, A. D. 1855.

Unto the Honorable, the Judge of the Circuit Court of Clark

county in chancery setting, humbly complaining, showeth unto your Honor your orator, Henry K. Hardy, of said county, that one Timothy Harrell having become entitled to the benefits of the Act of the Congress of the United States, entitled "An Act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State to aid in the construction of the canals authorized by law, and for making donations of land to certain persons in Arkansas territory," approved May 24th, 1828, by virtue of his having been a settler in that part of the territory of Arkansas, which by the first article of the treaty between the United States and the Cherokee Indians, west of the Mississippi, ratified the 23d day of May, 1828, had ceased to be a part of said territory, and his removal from such settlement according to the provisions of that treaty and authorized to enter with the proper Register of the Land Office, a quantity not exceeding two quarter sections of land, on any of the public lands in said territory, the sale of which was authorized by law. In conformity with the terms and provisions contained in said Act, and the said Timothy Harrell, having become so entitled, afterwards departed this life, and thereafter on or about the 17th day of May, 1830, proof of such settlement and removal was adduced by and on behalf of the heirs of said Timothy before the Register and Receiver of the Land Office at Little Rock in said territory, who being satisfied with the testimony adduced of such actual settlemeut and subsequent removal decided in favor of their claim, and allowed the same to a donation of three hundred and twenty acres of land, pursuant to the provisions of said Act; and in connection therewith the said heirs applied to the Register of said Land Office to enter, as and for such donation and in satisfaction of their said claim, the following described tract of land situate in said county of Clark and now within the district of lands, subject to sale at Washington in this State, but which were at the time mentioned above subject to entry and sale at said office at Little Rock, viz.: the south-east quarter of section twenty-three and the south-west quarter of section twenty-four in township eight, south of range twenty-two west, containing three hundred and twenty acres, which entry was allowed on the 22d day of May, 1830, by the said Register, and a certificate thereof in due time transmitted to Washington city, where, as your orator is informed and believes, the Commissioners of the General Land Office, in conformity with law and the usages of the said department, and under instructions from the Secretary of the Treasury, suspended said claim, and from some supposed defect in or objection to the same refused to confirm the decision of said Land Office, or to sanction such entry, or cause to be issued any patent for said land until the 5th day of February, A. D. 1846, when said claim was finally confirmed and a patent of that date, signed by the

President of the United States and under the seal of the General Land Office, was issued, whereby there was granted by the United States, to the heirs of said Timothy Harrell, deceased, and to their heirs and assigns, the said tract of land above described, as being situated in the district of lands, subject to sale at Little Rock aforesaid, as in and by a duly certified copy of the proof adduced before said Land Office in support of said claim to a donation, and their opinion thereon, remaining on file in said Land Office herewith exhibited and filed, marked A., and prayed to be taken and considered as paid hereof, and a copy of said patent (the original being held subject to the inspections of parties and the order of the Court here) herewith exhibited and filed marked B., and prayed to be taken and considered as part hereof, will more fully and at large appear.

Your orator further represents that said heirs of Timothy Harrell, deceased, by and on whose behalf proof was made of said claim, and who applied to enter said land therewith, were Elizabeth Harrell, William Harrell, and Isham Harrell, and who were the only children and next of kin of said Timothy, and entitled to inherit his estate, that previous to the year 1842, the said Elizabeth had intermarried with one Elias Hays, and died leaving her surviving, her only children and heirs at law, Archibald G. Hays, and Spence H. Hays, and who were in the said year 1842, infants of tender years, and have ever since continued to be minors under the age of twenty-one years. That on the 12th day of July, A. D. 1853, the said Elias Hays, as guardian of said minors, and for and in their behalf filed his bill in this Honorable Court against the said William Harrell, for a partition of said lands, or sale thereof, in case partition could not be made, in which suit such proceedings were had, and upon due and legal notice to the said William, that by final decree of this Court at its September Term, A. D. 1853, said lands were decreed to be sold, and in pursuance of said decree were on the 2d day of January, A. D. 1854, at the Court house door, in said county, and upon the notice required by said decree duly and legally offered for sale by Isaac W. Smith, Thomas D. Kingsbury, and George Kingsbury, the commissioners appointed in and by said decree, to carry the same into execution, and at which public sale so made and held, your orator being the best and highest bidder for said land, became the purchaser of the same, and on the said 2d day of January, A. D. 1854, your orator received of the said commissioners their deed of that date, whereby after reciting said decree, advertisement of notice of sale, and sale to your orator, they, in consideration of the premises, and by virtue of the authority vested in them by said decree, granted, bargained and sold unto your orator, all the right, title, interest, and claim of the said Archibald Y. Hays, and William Harrell, in and to said land, which sale was approved by this Court at its March Term thereof, A.

D. 1854, and at said Term, said deed was duly acknowledged by said commissioners, and was duly recorded, in the office of the Clerk, and ex-officio, Recorder of said county, as in and by said deed, (held, subject to the inspection of parties, and the order of the Court, here,) a duly certified copy whereof, together with the certificate of acknowldgment, and record thereof is herewith filed and exhibited, marked C., prayed to be taken and considered as part hereof, will more fully and at large appear; and your orator further represents, that the said Isham Harrell departed this life in the year 1849, under the age of twenty-one years, and administration of and upon his estate was granted by the Probate Court of said County of Clark, to Samuel Mecum, who became duly qualified, and took upon himself the burthen of such administration, and at the April Term of said Probate Court, for the year 1854, the said administrator presented his petition praying for an order of sale of the interest of said Isham, deceased, as one of the heirs of said Timothy, in and to said lands, and it appearing to said Court that the prayer of said petition ought to be granted, said Probate Court did order and direct the same to be sold by a commissioner, upon the notice and upon the terms prescribed in and by said order. and which sale was directed by said Court to be made on the 17th day of July, in said year at the door of the Court house in said county, and at which time and place, due notice of such sale having been given by advertisement thereof, pursuant to said orders, Robert L. Pegues, the commissioner appointed by said Probate Court, exposed and offered for sale to the highest bidder, said lands, and all the interest, estate and claim of the said Isham Harrell, deceased, in or to the same, and at which sale so made and held, your orator being the best and highest bidder, became the purchaser thereof, and on the said 17th day of July, 1854, your orator received from the said commissioner his deed of that date, whereby after reciting such petition, order of sale, notice thereof, and sale to your orator, the said Pegues as such commissioner, granted, bargained and sold to your orator, all the right, title, interest, and claim of the said Isham Harrell, deceased, in and to said land, which deed was duly acknowledged by the said commissioner, and is duly recorded in the office of the said recorder, as in and by said deed held, subject to the inspection of parties, and the order of the Court here, a duly certified copy whereof, with the certificates of such acknowledgment and record, is herewith filed and exhibited, marked D., and prayed to be taken and considered as part hereof, will more fully and at large appear.

Your orator further represents that said tracts with others, were entered and purchased from the United States, on the 8th day of June, A. D. 1836, at the Land office at Washington, within which District the same were then included, by one Gabriel W. Denton, who received a certificate of purchase therefor, numbered

2356, such entry and purchase being in part for the following described tract, namely, section twenty-four, and the south-east quarter of section twenty-three, in said township and range. So far as your orator is informed and believes, such sale to said Denton was to all appearances regularly made, and according to the forms prescribed by law or instructions to said District Land office, and said Denton received the usual receipt or certificate of payment from the Receiver of said Land office, and the Register thereof issued and transmitted to Washington City the patent certificate usual in such cases, upon which a patent would issue to said Denton, and for aught your orator knows or believes to the contrary, such entry and sale was made and permitted, in good faith by, and on the part of said Denton, and of said Register and Receiver, and in ignorance of the fact that a part of the same land had been as hereinbefore set forth applied for, to be entered with and in satisfaction of said claim to a donation, by and on behalf of the heirs of said Timothy Harrell, and was made and permitted through mistake.

Your orator further represents, that after said entry of said Denton was made in or previous to the year 1842, the auditor of public accounts of this State, in accordance with the statute enjoining such duty upon him, caused to be procured from the Register of said Land office at Washington, an abstract of lands entered and sold at that office, and therefore subject, or deemed to be subject to taxation, under the laws of this State, concerning revenue, and which abstract included by number and description the said lands so sold and purchased by the said Gabriel S. Denton, at said Land office, and a description list of the lands so purchased from the United States at said Land office, among which were those so sold to the said Denton, and supposed to be taxable, was by the said auditors, in or previous to the said year 1842, furnished to the sheriff, and ex-officio, assessor and collector of taxes, in and for said County of Clark, and said lands so entered by said Denton, were accordingly, as your orator is informed and believes, and so avers, listed by, and assessed to, and in the name of said Gabriel S. Denton, in said County of Clark, for taxation, in and for said year 1842, and said lands were not listed or assessed for taxation in, or for said year, by or in the name of any other person, or in any other manner, or by any other means, than is hereinbefore stated, and because the same were supposed to have become subject to taxation as the property of said Gabriel S. Denton, by reason of his purchase thereof as aforesaid, from the United States, at said Washington Land Office, and your orator is informed and represents to the Court here, that on the 15th day of January, 1847, one George W. Wells, as Sheriff of said County of Clark, made and executed his deed of that date, whereby, after reciting that a great number of tracts of land situate in said county had been regularly entered,

listed and assessed for taxation, to and in names of various persons, and among them, that said section twenty-four, and south-east quarter of section twenty-three had been entered and listed for taxation, for the taxes due thereon, for the year 1842, to and in the name of the said Gabriel S. Denton, to whom the same were therein described as having been patented, and all such taxes remaining unpaid, Willis S. Smith, then sheriff of said County, in pursuance of notice previously given, proceeded on the 7th day of November in that year, to sell all of said lands mentioned in said deed, for the taxes, penalty and costs due thereon, and at such sale Benjamin S. Duncan, Harris Flanagin, and Benjamin L. Brittin became the purchasers of all of said lands for the amounts of such taxes, costs and penalty, and received of said Smith, as such sheriff, his certificates of purchase to that effect, and further reciting that it appeared to him from endorsements on said certificates that said Brittin had transferred all his interest therein to said Duncan and Flanagin, that twelve months had elapsed since said sale, and the said Duncan and Flanagin demanding a deed for said lands, the said Wells, as successor to said Smith, in said office of sheriff, in consideration of the premises, granted, bargained, aliened, enfeoffed and sold to the said Duncan and Flanagin, their heirs and assigns, divers of said tracts of land therein described, and among them the said section twenty-four, and south-east quarter of section twenty-three, purporting to grant and convey, the right, title, and interest of the different persons to whom said lands were assessed, and of every person or persons in and to the same, and which deed purports to have been acknowledged by said sheriff, George W. Wells, on the said day of its date, and was filed for record on the same day, and remains of record in the office of the said Clerk and ex-officio Recorder, as in and by a duly certified copy thereof, the original not being in the possession, or under the control of your orator, herewith filed and exhibited, marked E., and prayed to be taken and considered as part hereof, will more fully and at large appear.

Your orator further represents, that as a consequence of the decision of the commissioner of the General Land Office at Washington City, to confirm and allow the claim of the said Timothy Harrell to a donation, and of which proof had been so made by, and on behalf of his heirs, before said District Land officers, at Little Rock, and to allow and sanction the entry so applied to be made by them, in satisfaction of said claim, and to cause and order a patent to be issued to them for said three hundred and twenty acres of land, so applied for and entered by them, the said commissioner also decided to set aside and cancel the said entry and certificate thereof, so made by and granted to the said Gabriel S. Denton, and no patent was ever issued to him, or any other person thereon, and said entry was accordingly set aside

and annulled, as having been made and allowed illegally and improvidently, and in conflict with the prior claim, and entry aforesaid, of the heirs of the said Timothy Harrell, and as to said three hundred and twenty acres of land, so embraced within the entry of said Denton, no title thereto was ever acquired thereby, and afterwards, some time in the month of February, 1849, the United States caused to be refunded and paid to said Denton, the purchase money paid by him therefor, at the time of his supposed entry thereof, as hereinbefore stated.

Your orator further represents, that said southeast quarter of section twenty-three, and southwest quarter of section twenty-four, are not and never were in the actual occupation, cultivation, or possession of any person, but are vacant and wild lands, of which the said heirs of Timothy Harrell, after the issuance of said patent, and by virtue thereof. And your orator, since he acquired and succeeded to their title, as the successive owner thereof, have been entitled to and have had the constructive possession. Your orator further represents, that at the time of said alleged sale for taxes in November, 1842, the said heirs of Timothy Harrell were minors, under the age of twenty-one years, and so continued to be until within three years next before the institution of this suit; and in case it shall appear that your orator is not correctly informed in that respect, and that any one or more of said heirs were so under age, at the time of said alleged tax sale, and so continued to be, he will and does insist that he may be entitled to the benefit of such disability as to the share or interest of such minor so acquired and purchased by your orator. And your orator, further complaining, submits to the Court here whether said collector's deed, exhibited and marked E., does or can by law, and upon the supposed facts therein recited and set forth, convey or vest any title whatever in or to said two quarter sections of land, in the said Duncan and Flanagin; and he further insists and submits, that upon the facts hereinbefore stated, the said Gabriel S. Denton had no interest in said land subject to taxation, and that such sale of his supposed interest therein was and is wholly inoperative and void as against the heirs of said Timothy Harrell, and did not in any wise affect or impair the title subsequently acquired by them upon the confirmation of their said claim to said land as a donation, and the consequent issuance of said patent to them for the same; nevertheless, your orator represents that said void tax deed remains of record in the office of said recorder a cloud and an incumbrance upon the title of your orator, and he is informed, believes, and so represents, that said Duncan and Flanagin assert and pretend to have title to and to be the owners of the same, whereby a doubt is liable to be cast on the title of your orator, and the value of the said lands greatly lessened and injured; and your orator is advised, it is meet and proper that such cloud and incumbrance

should be removed, and the title to said land settled and quieted; and your orator has often applied to said Duncan and Flanagin, who are prayed to be made defendants herein, to surrender and cancel said alleged collector's deed, or to relinquish, or quit claim to your orator their pretended claim and interest under or by virtue thereof in and to said two quarter sections of land, as in equity and good conscience they should do, but they, to comply with such your orator's reasonable requests, have hereto wholly refused; and, on the contrary thereof, pretend to have title thereto as against your orator. All which doings and pretences of the said defendants are contrary to equity and good conscience, and tending to the manifest injury of your orator, are, as he is advised, properly relievable by this Honorable Court; therefore, to the end thereof, and that the said defendants may, upon their several and respective corporal oaths, full, true, direct, and perfect answer make to all and singular the allegations and statements hereinbefore set forth, as fully and minutely as though the same was here again repeated, item by item, and they thereunto particularly interrogated, and that they may admit the correctness of the several exhibits hereinbefore referred to, and that by decree of this Honorable Court the said alleged collector's deed may be annulled and set aside as to the said two quarter sections of land, and the said defendants be required to relinquish and quit claim unto your orator the same and all of their supposed interest therein, and particularly enjoined from intermedling therewith, or asserting title to the same; and that the title of your orator thereto may be quieted and relieved from the cloud and incumbrance of such pretended tax title, and that your orator may have such other and further relief as the nature of his case may require, and unto equity shall appertain, he prays process of subpœna against the said defendants, directed, &c., returnable, &c., and your orator, &c.

WATKINS & GALLAGHER,
Solicitors for Complainant.

Upon which is the following endorsement:
Filed March 20th, 1856.

J. W. SMITH, *Clerk.*

Copy of Patent.

Register's Certificate, No. 125.
Claim, No. 249.

Exhibit B.

The United States of America,
To all to whom these presents shall come—greeting:

Know you that in pursuance of the provisions of the eighth section of the Act of Congress, approved on the 24th day of May,

1828, entitled An Act to aid the State of Ohio in extending the Miami Canal from Dayton to Lake Erie, and to grant a quantity of land to said State to aid in constructing of canals, authorized by the law, and for making donations of lands to certain persons in the Arkansas Territory, and by the other Acts making donations to settlers in the said Territory, now State of Arkansas. there has been deposited in the General Land Office a certificate of the register of the Land Office, at Little Rock. in the said State, numbered one hundred and twenty-five (125), whereby it appears that the heirs of Timothy Harrell, deceased, have entered conformably to the Acts of Congress aforesaid. The southeast quarter of section twenty-three (23), and the southwest quarter of section twenty-four (24), in township eighth (8), south of range twenty-two, west, containing (320) acres, situated in the district of lands subject to sale at Little Rock, Arkansas. There is, therefore, granted by the United States unto the said heirs aforesaid, and to their heirs, as aforesaid, the tract of land above described. To have and to hold the said tracts, with appurtenances, unto the said heirs aforesaid, and to their heirs and assigns forever, as tenants in common, and not as joint tenants.

In testimony whereof, I, James K. Polk, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. Given under my hand at the city of Washington, the 5th day of February, 1846, and of the Independence of the United States the seventieth.

By the President, JAMES K. POLK.

By KNOX WALKER, *Secretary.*

[SEAL.] S. H. LAUGHLIN,

Recorder af the General Land Office.

Record.—Vol. 3, page 1.

Upon which is the following endorsement:

Filed March 20, 1856.

J. W. SMITH, *Clerk.*

Exhibit D.

State of Arkansas.

Whereas, at the April Term of the Clark Probate Court, in the State aforesaid, Samuel Mecum presented and filed his petition as administrator of Isham Harrell, deceased, praying for an order of sale of said Isham's interest as one of the heirs of Timothy Harrell, deceased, in and to the following named and described lands, to wit: The southeast quarter of section (23), the southwest quarter of section (24), in township (8), south range 22, west, situated in the county and State aforesaid; and it appearing to the Court that saidMecum, as such administrator, was entitled to

an order of said Court for the sale of said lands, and whereas the said Court then and there ordered that said lands should be sold upon twelve months' credit, and then and there appointed Isaac W. Smith, commissioner, to conduct such sale, and fixed the day of sale on this the 17th day of July, A. D. 1854, and ordered that said commissioner should advertise said land to be sold at the court-house door of said county on the said 17th day of July, A. D. 1854, after first advertising them for sale according to the order of said Court in the premises; and whereas on the said 17th day of July, A. D. 1854, H. Flanagin, Esquire, filed a petition of said Smith, showing that he, as such commissioner, could not probably attend said sale, and him being absent, and the said Flanagin proving to the satisfaction of the Court that said Smith was absent, and could not be here on this day to conduct said sale, and proof being duly made before the Court that said lands had been duly, and in due time, and in all things, advertised according to the order of the Court in the premises; and whereas on the 17th day of July, A. D. 1854, the said Court appointed Robert L. Pegues, to conduct and carry out the sale of said lands, which order of appointing said Pegues was made on the motion of said Flanagin as attorney for said Mecum, as such administrator as aforesaid.

Now, therefore, know ye, that I, R. L. Pegues, as such commissioner, by virtue of the power and authority vested in me as such commissioner, did at the court-house door of said county, between the hours of ten o'clock, A. M., and three o'clock, P. M., of said day, offer said lands for sale at public auction and outcry to the highest and last bidder upon a credit of twelve months with bond and approved security, when Henry K. Hardy bid the sum of five dollars, and he being the highest and last bidder therefor, the same was then and there sold to him for the said sum of five dollars. Now, therefore, know ye, that I, Robert L. Pegues, as such commissioner, for the consideration aforesaid, have granted, bargained, and sold, and by these presents do grant, bargain, and sell all of the right, title, and interest, or claim, of the said Isham Harrell, deceased, in and to said lands hereinbefore described and mentioned, to have and to hold the same forever, with all the right, title, and interest, and claim of said Isham's in and to said lands aforesaid. Given under my hand and seal this the 17th day of July, A. D. 1854.

ROBT. L. PEGUES, [SEAL.]
Commissioner.

This deed was duly proven, acknowledged, and recorded in the Recorder's office of said county.

Upon which is the following endorsement:
Filed March 20th, 1857.

J. W. SMITH, *Clerk.*

Exhibit E.

This deed of conveyance, made this fifteenth day of January in the year of our Lord eighteen hundred and forty-seven, by and between George W. Wells, as Sheriff of the county of Clark, in the State of Arkansas, as such Sheriff of the first part, and Benjamin S. Duncan and Harris Flanagin, of the county and State aforesaid, of the second part. Witnesseth, that whereas the following tracts of land, to wit: The west half of the southeast quarter of section twenty-five (25), in Township seven (7), south, in Range twenty-two (22), west. The northeast quarter of Section five (5) in Township eight (8), south, in Range twenty-two (22), west. The northwest quarter of Section five (5), in Township eight (8), south, in Range twenty-two (22), west. The west half of the northwest quarter of Section thirty-two, the northeast quarter of section thirty-one (31), the west half of the southwest quarter of section twenty-nine (29.) The north half of section eighteen (18.) The southwest quarter of the southeast quarter of section thirty (30.) The five last mentioned lying and being in Township eight (8), south, in Range twenty-one (21), west. The east half of the southeast quarter of section twenty-two (22.) Section twenty-four (24.) The southeast quarter of section twenty-three (23.) The northwest quarter of section thirty-five (35.) The west half of the northeast quarter of section thirty-five (35.) The east half of section thirty four (34.) The south half of section thirty-five (35.) The seven last mentioned tracts lying and being in Township eight (8), south, in Range twenty-two (22), west. The northwest quarter of section one (1). The north half of section two (2.) The two last mentioned tracts lying and being in Township nine (9), south, in Range twenty-two (22), west. Fractional section twenty-six (26.) Fractional section twenty-five (25), west of Washita river. Fractional section twenty-three (23), west of the Washita river. The three last mentioned tracts lying and being in Township nine (9), south, in Range eighteen (18), west. The northwest quarter of section thirty-one (31.) The west half of the northeast quarter of section thirty-one (31.) The south half of section thirty (30.) The three last mentioned tracts lying and being in Township nine (9), south, in Range nineteen (19), west. The west half of section nine (9.) The northeast quarter of section nine (9.) The two last mentioned tracts lying and being in Township nine (9), south, in Range twenty (20), west. The east half of section nine (9). The northeast quarter of section five (5). The west half of section ten (10). The west half of section three (3). The west half of section seventeen (17). The southeast quarter of section four (4). The northeast quarter of section four (4). Section eighteen (18). The northeast quarter of section nineteen (19).

The ten last mentioned tracts lying and being in Township ten (10), south, in Range twenty (20), west. The first, fourth, sixth, ninth, thirteenth, twenty-seven of which tracts contained each eighty acres; and the second, third, fifth, eleventh, twelfth, sixteenth, twenty-first, twenty-fifth, twenty-seventh, twenty-eighth, thirty-second, thirty-third and thirty-fifth of which tracts contained each one hundred and sixty acres; and the seventh, fourteenth, fifteenth, seventeenth, twenty-third, twenty fourth, twenty-sixth, twenty-ninth, thirtieth and thirty-first of which tracts contained three hundred and twenty acres. The eighth tract of which contained forty acres; and the tenth and thirty-fourth of which tracts contained each six hundred and forty acres, and the eighteenth tract contained six hundred and eleven acres and the twenty-ninth hundredth of an acre, and the nineteenth tract contained one hundred and forty-four acres and fifty-three hundredths of an acre; and the twentieth tract contained one hundred and ninety-two acres and seventy-six-hundredths, all of said lands lying and being situate in the county of Clark, in the State of Arkansas, and the first of said tracts of land was patented in the name of A. Ashbrook and B. Ashbrook, and was entered and listed for taxation in the year eighteen hundred and forty-two, in the county of Clark aforesaid, agreeable to the laws of said State of Arkansas, for the regulating the collection of taxes therein; and whereas the second of said tracts was patented to Robertus Wilson, and was entered and listed for taxation in the year eighteen hundred and forty-two, in the county of Clark aforesaid, agreeable to the laws of said State of Arkansas, regulating the collection of taxes therein, for the years eighteen hundred and forty-one and eighteen hundred and forty-two, in his name; and whereas the third of said tracts was patented to Robertus Wilson and P. Sappington, and was entered and listed for taxation, in the name of Robert Wilson and P. Sappington, in the year eighteen hundred and forty-two, in the county of Clark aforesaid, for the years eighteen hundred and forty, eighteen hundred and forty-one and eighteen hundred and forty-two, agreeable to the laws of said State of Arkansas, regulating the collection of taxes therein. The fourth, fifth, sixth, seventh, eight, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth of said tracts of land were patented to Gabriel W. Denton, and were entered and listed for taxation, in his name, in the year eighteen hundred and forty-two, in the county of Clark aforesaid, agreeable to the laws of the State of Arkansas, regulating the collection of taxes therein. And whereas the eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth and thirty-fifth, were patented in the name of John S. Skinner, Henry

Ogden and William E. Emmett, and were entered and listed for taxation, in their names, in the year eighteen hundred and forty-two, in the county of Clark aforesaid, agreeable to the laws of said State of Arkansas, regulating the collection of taxes. And whereas neither the owner nor owners, nor any other person for him or them, having paid the State and county taxes assessed in pursuance of said laws, amounting, including penalty and costs, to the sum of two dollars and seventy-five cents, on each of the first, fifth, eleventh, twelfth, sixteenth, twenty-first, twenty-fifth, twenty-seventh, twenty eighth, thirty-second, thirty-third and thirty-fifth of said tracts; and amounting to the sum of fifteen dollars and thirteen cents on the second and third tracts each; and amounting to the sum of one dollar and fifty-one cents on the fourth, sixth, ninth, thirteenth and twenty-second each; and amounting to the sum of five dollars and twenty-three cents on the seventh, fourteenth, fifteenth, seventeenth, twenty-third, twenty-fourth, twenty-sixth, twenty-ninth, thirtieth and thirty-first of said tracts each; and amounting to the sum of ninety-cents on the eighth tract, and amounting to the sum of ten dollars and eighteen cents on the tenth and thirty-fourth of said tracts each; and amounting to the sum of nine dollars and sixty-nine cents on the eighteenth of said tracts; and amounting to the sum of two dollars and forty-four cents on the nineteenth of said tracts; and amounting to the sum of three dollars and twenty-five cents on the twentieth of said tracts of land, for the years for which they were taxed as aforesaid, in the year eighteen hundred and forty-two, within the time prescribed by law for the payment thereof, and there being no personal property belonging to the said A. and B. Ashbrook, Robertus Wilson, P. Sappington, Gabriel W. Denton, John S. Skinner, Henry Ogden, and William C. Emmett, or either of them, within said county, whereon to levy and make distress the same, therefore, Willis S. Smith, the then Sheriff of the County of Clark and State aforesaid, did proceed to advertise, and give at least thirty days' previous notice, according to law, that he would sell at public auction, on Monday, the seventh (7) day of November, eighteen hundred and forty-two, at the Court-house door, in the Town of Greenville, the then county seat of said county of Clark, the said tracts of land, or so much of each of said tracts as would be sufficient to pay the taxes, costs and penalty assessed thereon in the years eighteen hundred and forty-two, which said advertisements contained the name of the persons purporting to be the owners, and a particular description of each of said tracts, and the amount of taxes and penalty due on each of said tracts, due thereon, as assessed in the year eighteen hundred and forty-two, was published in the Arkansas Times and Advocate, a newspaper published at Little Rock, and was also set up at the Court-house door, in the said county of Clark, at least thirty days previous to

said day of sale; and on the seventh day of November, in the year aforesaid, the said taxes, penalty and costs on each of said tracts of land still remained unpaid, the said Willis S. Smith, the then sheriff as aforesaid, did proceed to sell at public auction the said tracts of land, or so much of each thereof as would be sufficient to pay the taxes, penalty and costs due on each of said tracts as aforesaid; whereupon Benjamin S. Duncan, Harris Flanagin and Benjamin L. Brittin bid and offered to pay the taxes, penalty and costs and charges due on each of said tracts, for each of said tracts respectively, and no other person or persons bidding or offering to pay the taxes, penalty and costs due on either of said tracts of land for less than the whole thereof, the said several tracts were each then and there stricken off to the said Benjamin S. Duncan, Harris Flanagin and Benjamin L. Brittin, which said State and county taxes, penalty and costs did amount on each of said tracts, as hereinbefore stated, the receipt of which several is fully acknowledged in certificate of purchase given by the said Willis S. Smith, the then sheriff to the said purchasers. And whereas it appears to me, from endorsement made on the certificate given for the several tracts of land, that Benjamin L. Brittin, on the fourth day of November, eighteen hundred and forty-three, did transfer all his right, title, interest and claim to each of said several tracts of land, to Benjamin S. Duncan and Harris Flanagin. And whereas it appears to me, that the east half of the southwest quarter, and the southeast quarter of section thirty, in Township nine south, in Range nineteen west, and the southwest quarter of section three, in Township ten south, in Range twenty west, and the west half of the northeast quarter of section nine, in township nine south, in range twenty west, have severally been rendered by the original owners thereof, and the time of twelve months, the time allowed by law, having expired since the day of sale, and the said Benjamin S. Duncan and Harris Flanagin having produced to me, George W. Wells, sheriff of Clark county, the certificate granted by Willis S. Smith, the then sheriff, to Benjamin Duncan, Harris Flanagin and Benjamin L. Brittin, transferred by the said Benjamin L. Brittin as aforesaid, and the said Benjamin S. Duncan and Harris Flanagin requiring of me a deed for the same: Now know ye, that I, George W. Wells, Sheriff of the County of Clark, in the State of Arkansas, as such sheriff, by virtue of the authority in me vested, in consideration of the premises, as well as in consideration of the sum of one dollar, in hand paid, the receipt of which is hereby acknowledged, have granted, bargained, aliened, enfeoffed and sold, and by these presents do grant, bargain, sell, alien and enfeoff to the said parties of the second part, their heirs, executors, administrators and assigns, all of the above described first, second, third, fourth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth,

fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth and thirty-fifth tracts of land, except the east half of the southwest quarter, and the southeast quarter of section thirty, in township nine south, in range nineteen west, and the southwest quarter of section three, in township ten south, in range twenty west, and the west half of the northeast quarter of section nine, in township nine south, in range twenty west, hereby granting and conveying to the parties of the second part, all the right, title and interest of the said A. and B. Ashbrook, Robertus Wilson, P. Sappington, Gabriel W. Danton, John S. Skinner, Henry Ogden and William C. Emmett, and all and every person or persons whomsoever in the same, together with all the lands above and hereditaments; to have and to hold the said lands to the parties of the second part, their heirs, executors, administrators and assigns, forever, as fully and absolutely as I, the said George W. Wells, as sheriff as aforesaid, and under the authority aforesaid, might, could or ought to sell and convey the same.

In testimony whereof, I, George W. Wells, Sheriff as aforesaid, as such sheriff, have hereunto set my hand and seal, on the and year first above written.

G. W. WELLS, [SEAL.]
Sheriff Clark County, Ark.

Signed, sealed and delivered
in the presence of
J. O. YOUNG,
JOSHUA PHILLIPS.

The State of Arkansas, }
County of Clark. }

Be it remembered that, on this the 15th day of January, in the year eighteen hundred and forty-seven, personally appeared before me, Joshua Phillips, an acting Justice of the Peace, in and for the county of Clark, George W. Wills, Sheriff of said county, to me personally well known, who stated and acknowledged that he executed the within and foregoing deed for the uses and purposes therein mentioned and set forth, and by virtue of the authority therein recited.

JOSHUA PHILLIPS, *J. P.*

The State of Arkansas, }
County of Clark. }

I, Isaac W. Smith, Clerk of the Circuit Court, and ex-officio Recorder in and for the county of Clark, in said State, do hereby certify that the foregoing deed was filed for record in my office

on the 15th day of January, 1847, and the same is now duly recorded in Record Book F, pages 378, 379, 380, 381, 382 and 383.

In testimony whereof, I have hereunto set my hand, as Clerk and Ex-officio Recorder as aforesaid, and affixed the seal of said Court, at Arkadelphia, this, the 15th day of January, A. D. 1847. [SEAL.]

J. W. SMITH, *Clerk*,
and *Ex-officio Recorder*.
By JOHN S. T. CALLAWAY, *D. C.*

State of Arkansas, }
County of Clark. }

I, Isaac W. Smith, Clerk of the Circuit Court, and ex-officio Recorder in and for the county and State aforesaid, hereby certify that the foregoing pages, numbering from one to eleven, are a true and complete copy of the Record of which it purports to be, viz.: a Sheriff's Deed from George W. Wills, as Sheriff, to Benjamin S. Duncan and Harris Flanagin, filed in my office 15th January, 1847.

Witness my hand and the seal of said Court, at my office in Arkadelphia, this 14th day of April, A. D. 1855. [SEAL.]

J. W. SMITH, *Clerk.*
and *Ex officio Recorder*,
By W. M. RANDOLPH, *D. C.*

Exhibit A.

On the 17th day of May, 1830, personally appeared Larkins Womack and Isham Harrell, both of lawful age, who, being sworn, say they were well acquainted with Timothy Harrell, deceased, who moved with his family, in the spring of the year 1827, to that part of the territory of Arkansas ceded to the Cherokee Indians by the treaty of 1828, and settled on the Bayou Menard, about four miles south of east from Cantonment Gibson, where he was actually settled and living as the head of a family himself, over the age of twenty-one years. On the 24th of May, 1828, engaged in cultivation on his own account, of an improvement of about seven or eight acres, with a dwelling thereon, in which he resided with his family.

The affiants further say, that the said Timothy Harrell, with his family, removed from the aforesaid ceded territory, in the fall of the year 1828, and settled in Crawford county, A. T., east of the western boundary thereof.

The affiants further say, that said Timothy Harrell is said to have died in Crawford county, A. T., in the month of January, 1829, which they verily believed to be the fact, one of the said affiants, Isham Harrell, having obtained letters of administration

on the estate of said deceased, duly authenticated by the clerk of said county, which said letters here exhibited to the Register and Receiver of this Land office.

LARKIN WOMACK,
ISHAM HARRELL.

Sworn to and subscribed at Land office, at Little Rock, on the day and year above written.

BEN DESHA,
Receiver.
B. SMITH,
Register.

(Endorsed.)
No. 249.

Heirs of Timothy Harrell, dec'd.,
Confirmed 17th March, 1830.
BEN DESHA, *Receiver.*
B. SMITH, *Register.*

REGISTER'S OFFICE, Little Rock,
March 3d, 1855.

This is to certify that the within affidavit is a true and correct copy of the one on file in this office.

R. A. WATKINS,
Register.

Upon which is the following endorsement.
Filed March 20th, 1856.

J. W. SMITH, *Clerk.*

Exhibit C.

Whereas, the undersigned, Isaac W. Smith, Thomas D. Kingsbury and George Kingsbury, as Commissioners, appointed by order and decree of the Clark Circuit in chancery sitting, in and for said county of Clark and State of Arkansas, at a Court began and holden on the 19th day of September, A. D. 1853, to sell the following described lands hereinafter mentioned, to effect a division, &c., wherein Elias Hays, a guardian, &c., of Archibald Yell Hays and Spence Petters Hays, minors and complainants, and against William Harrell, defendant; and whereas, by virtue of said order and decree, we, the aforesaid Commissioners, by virtue of the power and authority in us vested, advertised the following described lands for sale, at public auction and outcry, to be sold at the court house door of said county, on the 2d day of January, 1854, which lands are described as follows, to wit:

The southeast ¼ of section (23), and the southwest ½ of section (24), in township (8), south of Range (22), west, and after having first duly and in due time advertised said lands for sale, as such Commissioners, we did proceed, at the Court-house door

of said county, within legal hours for judicial sales, to offer said lands for sale, at public auction and outcry, to the highest and last bidder, upon a credit of twelve months, when Henry K. Hardy bid the sum of forty-eight dollars, and he being the highest and last bidder therefor, the same was knocked off and sold to him for the price and sum aforesaid, and the said Hardy, having given bond and security for the amount of his bid. Now, therefore, know ye, that we, the undersigned, Commissioners, by virtue of the power and authority in us vested by said decree, and for the consideration aforesaid, do hereby grant, bargain and sell, and by these presents have granted, bargained and sold, unto the said Hardy all the right, title, interest and claim of the said Archibald Y. Hays and Spence P. Hays, and William Harrell, in and to said lands aforesaid, to have and to hold the same forever, with all the right, privileges and appurtenances thereto belonging.

Given under our hands and seals this, the 2d day of January, A. D. 1854.

J. W. SMITH,
T. D. KINGSBURY,
G. KINGSBURY,
Commissioners.

Duly proven and acknowledged in open Court, at the March Term, A. D. 1854, and regularly recorded, with proper certificates, in the Recorder's office of Clark county, Arkansas, in Book 2.

Upon which is the following endorsement:
Filed March 20th, 1856.

J. W. SMITH, *Clerk.*

Record Entry.

And afterwards, to wit: on the 21st day of March, A. D. 1856, at and during the March Term, A. D. 1856, the following proceedings were had in the foregoing case, before the Honorable Abner A. Stith, Judge thereof, to wit:

Henry K. Hardy, Complainant,
vs.
Benjamin S. Duncan and
Harris Flanagin, Defendants.

Bill in Chancery.

Came this day, James S. Witherspoon, and representing to the Court here that he was and is one of the executors of the last will and testament of Henry K. Hardy, deceased, and presented to the Court a bill of complaint, wherein Henry K. Hardy, his testator, was complainant, and Benjamin S. Duncan and Harris Flanagin were defendants, that said bill of complaint had been

prepared previous to the death of the said Henry K. Hardy, and that the same had been delivered by him to the defendants therein thirty days before the last (September Term) of this Court, A. D. 1855, for inspection, and was considered as filed, at that time, in Court, but the same was neglected to be filed, and that the said Henry K. Hardy had, since that time, departed this life testate, having duly made and published his last will and testament, and constituting thereby James E. M. Buckman, Thomas D. Kingsbury, and James L. Witherspoon, executors thereof, and that letters testamentary, under said last will and testament, have been duly granted them by the Probate Court of Clark county, State of Arkansas, the Court having proper authority, and they having taken upon themselves the burden of the same, that it was clearly understood that said bill of complaint should be filed in thirty days before the September Term, A. D. 1855, of this Honorable Court, and as of a time previous to the death of the said Henry K. Hardy, deceased, and that the suit should thereupon be revived and proceed in the names of said executors, and the said Benjamin S. Duncan and Harris Flanagin also being present in Court, and admitting the above facts to be true, and consenting to such order being made: it is therefore ordered and adjudged, that said bill of complaint and the several exhibits thereto attached shall be filed, and marked as of a time thirty days previous to the September Term of this Honorable Court, and as of a time previous to the death of the said Henry K. Hardy, and that his death being admitted, that this suit be, and is hereby revived, and ordered to progress in the name of said executors, and that this suit be continued until the next term of this court, without prejudice, and that said complainants have leave, if they think proper so to do, to amend their said bill as they may think proper, at any time previous to thirty days before the next term of this Court, and that said executors have leave to file a duly authenticated copy of their letter testamentary on or before the first day of the next term of this Court.

And afterwards, to wit: on the 17th day of September, A. D. 1856, at and during the September Term, A. D. 1856, the following proceedings were had in the foregoing case before the Honorable Abner A. Stith, Judge thereof, to wit:

Record Entry No. 118.

James E. M. Buckman, J. L. Witherspoon and T. D. Kingsbury, Ex'rs of H. K. Hardy, dec'd, Complainants,
vs.
Benjamin S. Duncan and Harris Flanagin, Defendants.
} Bill for Title.

On this day come the defendants by attorney, and on leave first had and obtained, filed their answer and exhibits herein.

Clark. } In Clark County Circuit Court in Chancery
to September Term, A. D. 1856.

Answer to Bill.

The joint and several answer of Benjamin S. Duncan and Harris Flanagin to the bill of complaint exhibited against them by Henry K. Hardy, saving and reserving to themselves all manner of benefit of exception to the many errors, inaccuracies and insufficiencies in said bill contained for answer thereto or so much or such parts thereof as they are advised, is material or necessary for them to make answer do answer and say, that they have no knowledge whether the said Isham Harrell was entitled to a donation of lands as is in said bill set forth, whether the proof was made as therein charged, when said Harrell departed this life, whether said proof was approved as sufficient, whether the application to enter said lands was made, whether said entry was allowed, and whether said lands were subject to enty at Little Rock, except what they have learned from rumor and the complainant's bill and exhibits, but they supposed them to be severally true.

They believe a patent was issued as is charged in said bill, but have no information whether the location was suspended except as all other claims of that character were suspended to await objections to them from the occupants of improvements on the lands located. That as they are informed and believe the patent was issued upon the testimony first taken, and not upon any additional proof required or given, they admit that the only children and heirs of Timothy Harrell were Elizabeth Harrell, William Harrell and Isham Harrell, and that previous to the year 1842, the said Elizabeth Harrell had married one Elias Hays, but they deny that she departed this life before that time, and assert that she lived until the summer of eighteen hundred and forty-five, and died about the month of August in that year. They admit that she left surviving her children and sole heirs, Archibald Y. Hays and Spencer H. Hays. The first of whom was an infant of about two years of age in 1842, and the other was born after that time. That they have no knowledge whether exhibits A and B are correct or not, but suppose them to be so. They admit the institution of a suit for a division or sale of said lands as charged, and that at a sale thereof, the same was purchased by Henry K. Hardy; whether said proceedings were regular, or whether said lands were advertised according to the order of the Court, these affiants have no knowledge or information, and have no decided belief whether they were regularly advertised, but are inclined to believe that they were not. In this opinion they judge from a general carelessness by the complainant in regard to matters of that nature, and not from any one fact recollected. As to exhibit C, they believe the paper exhibited is a copy, so

far as it goes, but it lacks the certificates necessary to give it validity. They believe the proceedings in the chancery suit aforesaid to be sufficiently regular to bind the heirs of Elizabeth Harrell and William Harrell; and these defendants admit that Isham Harrell has departed this life, but at what particular time, they do not know; they are informed that his relations do not know at what time, nor have these defendants any positive belief except from idle rumors, from which they infer he died after 1849. They deny that to the best of their knowledge, hearsay or belief, that he was a minor in 1849, or that he died a minor. They deny that administration upon his estate was granted in Clark county to any person, but believe that administration was granted upon his estate in some county in the northwestern part of this State, they think in Crawford or Sebastian county, to one Samuel Mecum, who was qualified as such. They charge that the said Isham Harrell was not a resident of the State of Arkansas at the time of his death; that he did not die in this State; that if the complainant was possesser of any right in the lands sued for, the said Harrell did not die possessed of any lands in this county, and did not die possessed of any lands as they believe, nor of any estate in the county where said letters were granted. They charge that said letters were issued contrary to law, and that the Court issuing the same had no jurisdiction. They charge further that the said Henry K. Hardy well knew, at the time of said sale, of the papers filed in the Probate Court of Clark County, and which show that the said Court of Probate granting said letters, had no power to grant the same.

The defendant admits that the application was made for the sale of said Harrell's interest; said sale was ordered and took place, and a deed was made as charged in said bill; they believe that the exhibit D is a true copy of the deed given, but said exhibit wants the certificates necessary to give it validity, or to file. They answer further that the said lands with others were entered by the said Gabriel W. Denton in the manner and form as set forth in said bill, which entry was made in ignorance of any claim on the part of Timothy Harrell's heirs, and in good faith.

They admit further that said lands were assessed, taxed and sold in the manner in said bill set forth, and a deed executed therefor, as therein charged, and that the certified copy of said deed exhibit is a true copy thereof. They admit the entry of Gabriel W. Denton was set aside and the purchase-money returned as set forth in said bill. They admit that the said southeast quarter of section twenty-three, and the southwest quarter of section twenty-four were wild lands, and were not in the actual occupation or cultivation of any one, and neither the heirs of Timothy Harrell, or any person for them ever paid any taxes on said land. They deny that according to the best of their information, knowledge and belief, any of the heirs of Timothy Harrell were under

the age of twenty-one years; on the contrary, they have reliable information that each and all of them were over twenty-one years of age at the time of said sale, and if they are mistaken about this they aver that the said William Harrell became twenty-one years of age more than one year before the commencement of this suit, and that the said Isham Harrell was more than twenty-one years old before his death, and that the said Elizabeth Harrell was more than twenty-one years of age before her death, which occurred as aforesaid in the year 1845. They answer further and deny that the said complainant ever asked them to quit claim to him their title to the lands claimed, they admit that they claim title to said land.

The said defendants answer further and charge that section twenty-four, and the southeast quarter of section twenty-three, in township eight south of range twenty, west of the fifth principal meridian were entered and listed for taxation in the year 1842, eighteen hundred and forty-two, for said year in the name of Gabriel W. Denton. That the owners of said land were now residents of the county of Clark in the State of Arkansas. That the assessing of said land was regularly made, and the same was placed upon the tax book of said county. That no person paid the taxes on said lands or any part thereof before the 15th day of September, eighteen hundred and forty two. That said taxes as assessed on section twenty-four amounted to seven dollars and twenty cents, and there accrued therein a penalty for nonpayment of one dollar and eighty cents, and that the cost of advertising the same was twenty-eight cents, and the Sheriff's commission ninety cents, making ten dollars and eighteen cents, the amount of the penalty and costs, due thereon at the time of sale. That the said Sheriff on or about the 15th day of September, 1842, filed in the Clerk's Office in said county a list of all lands and town lots in said county, on which the taxes had not been paid belonging to or assessed to nonresidents, which list includes the lands aforesaid, and contained the name of the person purporting to be the owner, and also the same description of lands as upon the tax book, and the taxes due thereon for that year, together with a penalty of twenty-five per centum. That the taxes for said year on the southeast quarter of section twenty-three amounted to the sum of one dollar and eighty cents, the penalty forty-five cents, the advertising twenty-eight cents, and the Sheriff's commission twenty-two cents; the whole amount of taxes, penalty and costs, being two dollars and seventy-five cents. That at least four weeks before the first Monday in November in 1842 the Sheriff caused a copy of said list to be published in the Times and Advocate, a newspaper printed in Little Rock in the State of Arkansas, to which was added a notice, the whole of them or as much thereof as should be necessary to pay the taxes and penalty charged thereon, would be sold at the Court House door of his

county, on the first Monday of November thereafter, unless said taxes, penalty and cost of advertisement should be paid before that time. That said collector caused a copy of said advertisement to be set up at the Court House door of said county of Clark.

That said collector did, before the day of sale mentioned in said notice, cause to be recorded in the office of the clerk of the County Court, in a book by him provided and kept for that purpose, a copy of said advertisement; and said clerk certified that the same was published in the Arkansas Times and Advocate, a newspaper published in Little Rock, and was published at least thirty days before said day of sale. That no person paid the taxes on said land before the seventeenth day of November, that being the day of sale, and said collector on that day did attend at the court-house door of the county of Clark, and offered said lands, viz., section twenty-four, and the southeast quarter of section twenty-three, in Township Eight south, in Range Twenty-two west, separately. At said sale these defendants and one Benjamin L. Britton offered to pay the taxes, penalty, and costs, on each of said tracts for the whole thereof; and no person offering to pay the said taxes, penalty, and costs on said land for less than the whole thereof, the same was then and there sold to them. That the purchasers of said land forthwith paid to said collector the amount of taxes, penalty, and costs charged on said land, and the collector made out and delivered to them the certificates of purchase, describing the land sold as the same was described in the tax-book, and stating the amount of taxes and penalty for which the same was sold, and that payment was made. That the clerk of the County Court attended at said sale, and made a record thereof, stating to whom it was sold, for how much, how much of the land was sold. That the said Benjamin L. Britton by endorsement in writing on said certificates, assigned and transferred all his interest in said land to the defendants, as set forth and stated in said bill, which is evidenced herewith by endorsement and transfer to that effect signed by said Britton on the back of the certificate of the sheriff and collector, signed 7th November, 1842, herewith filed, and marked Exhibit X., No. 1, and part hereof. They answer further and say, that on the first day of January, in the year eighteen hundred and forty-seven, George W. Wells, who was then sheriff and collector of said county of Clark, made and executed his deed as such sheriff and tax collector, which recited among other things that section twenty-four and the southeast quarter of section twenty-three, in Township Eight, south of Range Twenty-two west, the first containing six hundred and forty acres, and the last one hundred and sixty acres; both of which lay in the county of Clark, in the State of Arkansas, and was entered and listed for location in the name of Gabriel W. Denton, in the year eighteen hundred and

forty-two in said county, agreeable to the laws of the said State of Arkansas regulating the collection of taxes therein. That neither the owner nor owners, nor any person for them, having paid the state and county taxes assessed in pursuance of said laws, amounting, including penalty and costs, on the first of said tracts, to the sum of two dollars and eighteen cents, and on the last of said tracts to the sum of ten dollars and seventy-five cents, within the time prescribed by law for the payment thereof, and there being no personal property belonging to said Gabriel W. Denton within said county whereon to levy and make distress for the same, the said Willis S. Smith, the then sheriff of the county aforesaid, did proceed to advertise and give thirty days previous notice that he would sell at public auction on Monday, the seventh day of November, eighteen hundred and forty-two, at the court-house door in the town of Greenville, the then county seat of said county of Clark, the said tracts of land or so much of each of said tracts as would be sufficient to pay the taxes, costs, and penalty due on each of said tracts; and was published in the Arkansas Times and Advocate, a newspaper published at Little Rock, and was also set up at the court-house door in said county of Clark, at least thirty days previous to said day of sale; and on the seventh day of November, in the year aforesaid, the said taxes, penalty, and costs on each of said tracts of land still remaining unpaid, the said Willis S. Smith, who was still sheriff, did proceed to sell at public auction the said tracts of land, or so much of each as would pay the taxes, costs, and penalty due thereon as aforesaid; whereupon Benjamin S. Duncan, Harris Flanagin, and Benjamin L. Britton bid and offered to pay the taxes, penalty, and costs on each of said tracts for the whole thereof; and no person bidding or offering to pay the same for less than the whole thereof, the same was then and there sold to them for the taxes, penalty, and costs aforesaid, the receipt of which said several sums is acknowledged in certificates of purchase given by the said Willis S. Smith, sheriff as aforesaid; and that the said Benjamin L. Britton, by endorsement on said certificates transferred all his right, title, interest, and claim to the said Benjamin L. Duncan and Harris Flanagin; that the term allowed by law for the redemption of said lands had expired, and that the said Benjamin and Harris had produced to the said George W. Wells the certificates of sale given by the said Willis S. Smith, transferred by the said Benjamin L. Britton; and said George W. Wells, as sheriff and collector, did convey by said deed all the interest of the said Gabriel W. Denton, and all and every other person whomsoever, to the defendants herein, which deed was duly acknowledged before Joshua Phillips, an acting and duly commissioned justice of the peace in and for the county of Clark, and was recorded in the recorder's office of Clark county. The deed exhibited is, as your orator believes, a correct

copy of the record, but the recorder made two errors. They bring here a true copy of the original, and hold the original subject to the order of the court, and pray said copy may be taken as a part of this their answer, as Exhibit H., No. 2. And the said defendants answering further, answer and say, that in the months of January and February, in the year eighteen hundred and forty-seven, they caused to be published in the Washington Telegraph, a newspaper published in the town of Washington, in the State of Arkansas, for six weeks in succession, the last of which was more than six months before the first day of the September Term of Clark Circuit Court, a notice calling on all persons who could set up any right or title to section twenty-four, and the southeast quarter of section twenty-three, in Township Eight, south of Range Twenty-two west, in consequence of any informality, irregularity, or illegality connected with such sale, to show cause at the September Term of the Circuit Court of Clark in the State of Arkansas, to be holden on the second Monday of September, A. D. 1847, why the sale of said lands should not be confirmed; which notice stated the authority under which sale was held, and also contained the same description of the lands as that given in the conveyance to these defendants, and truly stated the price at which it was purchased, and the nature of the title by which it was held; and at the September Term of said Court in chancery, holden as described in said advertisement, these defendants filed their petition, which set forth the sale aforesaid of said lands for taxes, the advertisement before sale, the execution of said deed, the notice of the application to confirm said sale; and prayed for a confirmation thereof; and such proceedings were had therein that the Chancellor presiding in said Court, at the March Term thereof, held in the year 1848, decreed that said sale was in all things affirmed, and that all claim, right, or title of said Denton or any other person whatsoever should be vested in these defendants; and the said defendants bring here a copy of said petition and decree and advertisement for confirmation, which are prayed to be taken as a part of this answer, as Exhibit H., No. 3.

The defendants insist—

1st. That all of the facts necessary to vest the title in Timothy Harrell's heirs existed and were proven in 1830; and the decision granting a patent, if any took place, only decided the facts and proof in 1830 were sufficient.

2d. That the patent being issued in 1846, did not affect their claim, because in issuing their patent the department decided that the land belonged to them, so as to vacate the entry made by Denton in 1836.

3d. They insist that if the proceedings of said two sales were regular, then the title of the defendants is perfect, as infancy is no excuse for not redeeming lands sold for taxes.

4th. As to William Harrell's one-third part they insist, that

they and Benjamin L. Britton are the purchasers, and they are assignees of Benjamin L. Britton's interest at a sale for taxes of the land sued for, and that this action was not brought within five years of the date of said sale by way of limitation, and if he was a minor at that time, then that more than three years had elapsed after said disability had been removed. That they had the property sued for by virtue of a decree of confirmation of a tax sale made on the chancery side of the Circuit Court, at the March Term thereof, in the year eighteen hundred and forty-eight. That if he was a minor at that time, that suit was not brought within one year after said disability was removed.

5th. As to Isham Harrell's one-third part, by way of limitation, they insist upon the same facts being true, and the same law being applicable, as above stated in relation to William Harrell.

6th. As to Elizabeth Harrell, they insist upon said limitation of five years, as being applicable; and in case she was a minor at that time, then that the suit was not brought within three years after said disability had been removed.

7th. As to all of said heirs, they say, that defendants hold by virtue of a decree as aforesaid, and that the said Henry K. Hardy was possessed of all the interest he claimed for more than one year before the commencement of this suit; and they insist upon said statute of one year, limitation as to his claim. And the defendants will insist upon all these on the final hearing of this cause, and claim the same benefit as fully and to the same extent as if the same had been interposed by plea in due form. And defendants insist that the complainant has not, in and by his said bill, made or stated such a case as entitles him to the relief therein and thereby sought and prayed for, and defendants demur to the same, and will insist on said demurrer on the final hearing of this cause, and claim all benefit thereunto, as if the same had been interposed in due form; said defendants having fully answered, pray to be hence dismissed, with their costs most very fully expended, and in duty bound they will ever pray.

CUMMINS & GARLAND, *For Def'ts.*

State of Arkansas, }
County of Clark. }

We, Benjamin S. Duncan and Harris Flanagin, being duly sworn, do depose and say, that the matters of fact set forth in the foregoing answer are true, to the best of our knowledge, information, hearsay, and belief.

BEN. S. DUNCAN,
H. FLANAGIN.

Sworn to and subscribed before me,
Clerk of said Clark Circuit Court.
J. W. SMITH, *Clerk.*
September 15, 1856.

Upon which is the following endorsement:
Filed September 17th, 1856. J. W. SMITH, *Clerk.*

Exhibit H.—Question to Answer.

This deed of conveyance, made this fifteenth day of January, in the year of our Lord eighteen hundred and forty-seven, by and between George W. Wells, as Sheriff of the County of Clark, in the State of Arkansas, as such sheriff of the first part, and Benjamin S. Duncan and Harris Flanagin, of the county and State aforesaid, of the second part: Witnesseth, that whereas, the following tracts of land, to wit, the west half of the southeast quarter of section twenty-five (25), in township seven (7) south, in range twenty-two (22) west. The northeast quarter of section five (5) in township eight (8) south, in range twenty-two (22) west. The northwest quarter of section five (5) in township eight (8) south, in range twenty-two (22) west. The west half of the northwest quarter of section thirty-two. The northeast quarter of section thirty-one. The west half of the southwest quarter of section twenty-nine (29). The north half of section eighteen (18). The southwest quarter of the southeast quarter of section thirty (30). The five last mentioned tracts lying and being in township eight south, in range twenty-one (21) west. The east half of the southeast quarter of section twenty-two (22). Section twenty-four. The southeast quarter of section twenty-three (23). The northwest quarter of section twenty-five (25). The west half of the northeast quarter of section thirty-five. The east half of section thirty-four (34). The south half of section thirty-five (35); the seven last mentioned tracts lying and being in township eight (8) south, in range twenty-two west. The northwest quarter of section one (1). The north half of section two (2); the two last-mentioned tracts lying and being in township nine (9) south, in range twenty-two (22) west. Fractional section twenty-six (26). Fractional section twenty-five (25), west of Washita River. Fractional section twenty-three (23), west of Washita River; the three last-mentioned tracts lying in township nine (9) south, in range eighteen (18) west. The northwest quarter of section thirty-one (31). The west half of the northeast quarter of section thirty-one (31). The south half of section thirty (30); the three last-mentioned tracts lying and being in township nine (9) south, in range (19) west. The west half of section nine (9). The northeast quarter of section nine (9); the two last-mentioned tracts lying and being in township nine (9) south, in range (20) west. The east half of section nine (9). The northeast quarter of section six (6). The northwest quarter of section five (5). The west half of section ten (10). The west half of section three (3). The west half of section seventeen (17). The southeast quarter of section four (4). Section eighteen (18). The northeast quarter of section nineteen (19). The ten last-mentioned tracts lying and being in township ten (10) south, in range twenty (20) west. The first, fourth, sixth, ninth, thirteenth, twenty-second

of which tracts, contained each eighty acres; and the second, third, fifth, eleventh, twelfth, sixteenth, twenty-first, twenty-fifth, twenty-seventh, twenty-eighth, thirty-second, thirty-third, and thirty-fifth of which tracts, contained each one hundred and sixty acres; and the seventh, fourteenth, fifteenth, seventeenth, twenty-third, twenty-fourth, twenty-sixth, twenty-ninth, thirtieth and thirty-first of which tracts, contained each three hundred and twenty acres. The eighth tract of which contained forty acres, and the tenth and thirty-fourth of which tracts contained six hundred and forty acres, and the eighteenth tract contained six hundred and eleven acres and twenty-nine hundredths of an acre; and the nineteenth tract contained one hundred and forty-four acres and fifty-three hundredths of an acre. The twentieth tract contained one hundred and ninety-two acres and seventy-six hundredths.

All of said lands lying and being situate in the County of Clark, in the State of Arkansas, and the first of said tracts of land, was patented in the name of A. Ashbrook and B. Ashbrook, and was entered and listed for taxation in the year eighteen hundred and forty-two, in the County of Clark aforesaid, agreeable to the laws of said State of Arkansas, for regulating the collection of taxes therein. And whereas, the second of said tracts was patented to Robertus Wilson, and was entered and listed for taxation in the year eighteen hundred and forty-two, in the County of Clark aforesaid, agreeable to the laws of said State of Arkansas, regulating the collection of taxes therein for the years eighteen hundred and forty-one and eighteen hundred and forty-two, in his name. And whereas, the third of said tracts was patented to Robertus Wilson and P. Seppington, in the year eighteen hundred and forty-two, in the County of Clark aforesaid, for the years eighteen hundred and forty, eighteen hundred and forty-one, and eighteen hundred and forty-two, agreeable to the laws of said State of Arkansas, regulating the collection of taxes therein. And whereas, the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth, of said tracts of land, were patented to Gabriel W. Denton, and were entered and listed for taxation in his name, in the year eighteen hundred and forty-two, in the county aforesaid, agreeable to the laws of said State of Arkansas, regulating the collection of taxes therein. And whereas, the eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth and thirty-fifth, were patented in the name of John S. Skinner, Henry Ogden, and William C. Emmett, and were entered and listed for taxation, in their names, in the year eighteen hundred and forty-two, in the County of Clark aforesaid, agreeable to the laws of said State of Arkansas,

regulating the collection of taxes therein. And whereas, neither the owner nor owners, nor any other person for him or them, having paid the State and County taxes, assessed in pursuance of said laws, amounting, including penalty and costs, to the sum of two dollars and seventy-five cents, on each of the first, fifth, eleventh, twelfth, sixteenth, twenty-first, twenty-fifth, twenty-seventh, twenty-eighth, thirty-second, thirty-third, and thirty-fifth of said tracts, and amounting to the sum of fifteen dollars and thirteen cents. On the second and third tracts each, and amounting to the sum one dollar and fifty-one cents. On the fourth, sixth, ninth, thirteenth and twenty-second each, and amounting to the sum of five dollars and twenty-three cents. On the seventh, fourteenth, fifteenth, seventeenth, twenty-third, twenty fourth, twenty-sixth, twenty ninth, thirtieth and thirty-first of said tracts each, and amounting to the sum of ninety cents. On the eighth tract, and amounting to the sum of ten dollars and eighteen cents. On the tenth and thirty-fourth of said tracts each, and amounting to the sum of nine dollars and sixty-nine cents. On the eighteenth of said tracts, and amounting to the sum of ten dollars and forty-four cents. On the nineteenth of said tracts, and amounting to the sum of three dollars and twenty five cents. On the twentieth of said tracts of land for the years for which they were taxed as aforesaid, in the year eighteen hundred and forty-two, within the time prescribed by law for the payment thereof, and there being no personal property belonging to the said A. & B. Ashbrook. Robertus Wilson, P. Sappington, Gabriel W. Denton, John S. Skinner, Henry Ogden, and William C. Emmett, or either of them, within said county, whereon to levy and make distress for the same. Therefore, Willis S. Smith, the then Sheriff of the County of Clark and State aforesaid, did proceed to advertise, and give at least thirty days previous notice, according to law, that he would sell at public auction, on Monday, the seventeenth day of November, eighteen hundred and forty-two, at the Court-House door, in the Town of Greenville, the then county seat of said County of Clark, the said tract of land, or so much of said tracts as would be sufficient to pay the taxes, costs, and penalty assessed thereon, in the year eighteen hundred and forty-two, which said advertisement contained the name of the person purporting to be the owner, and a particular description of each of said tracts, and the amount of taxes and penalty, due on each of said tracts, due thereon as assessed in the year eighteen hundred and forty-two, as published in the Arkansas Times and Advocate, a newspaper published at Little Rock, and was also set up at the Court-House door in said County of Clark, at least thirty days previous to said day of sale, and on the seventh day of November, in the year aforesaid, the said taxes, penalty and costs, of said tracts of land, still remaining unpaid, the said Willis S. Smith, the then sheriff as aforesaid, did proceed to sell

at public auction, the said tract of land, or so much of such thereof, as would be sufficient to pay the taxes, penalty, and costs, due on each of said tracts as aforesaid, whereupon Benjamin S. Duncan. Harris Flanagin, and Benj. L. Britton, bid and offered to pay the taxes, penalty, costs and charges, due on each of said tracts respectively, and no other person or persons bidding, or offering to pay the taxes, penalty and costs, due on either of said tracts of land for less than the whole thereof, the said tracts were each then and there stricken off to the said Benjamin S. Duncan, Harris Flanagin and Benjamin L. Britton, which said State and county taxes, penalty and costs, did amount, on each of said tracts as hereinbefore stated, the receipt of which several sums is fully acknowledged in certificates of purchase, given by said Willis S. Smith, the then sheriff, to the said purchasers. And whereas, it appears to me, from endorsement made on the certificates given for the several tracts of land that Banjamin L. Britton, on the fourth day of November, eighteen hundred and forty-three, did transfer all his right, title, interest, and claim, to each of said several tracts of land, to Benjamin S. Duncan and Harris Flanagin.

And whereas, it appears to me that the east half of the southwest quarter, and the southeast quarter of section thirty, in township nine, south, in range nineteen, west, and the southwest quarter of section three, in township ten, in range twenty, west, and the west half of the northeast quarter of section nine, in township nine, south, in range twenty, west, have severally been redeemed by the original owners thereof; and the term of twelve months, the time allowed by law, having expired since the day of sale, and the said Benjamin S. Duncan and Harris Flanagin having produced to me George W. Wells, Sheriff of Clark county, the certificates granted by Willis S. Smith, the then sheriff, to Benjamin S. Duncan, Harris Flanagin, and Benjamin L. Britton, transferred by the said Benjamin L. Britton, as aforesaid, and the said Benjamin S. Duncan and Harris Flanagin requiring of me a deed for the same. Now, know ye, that I, George W. Wells, sheriff of the county of Clark, in the State of Arkansas, as such sheriff, by virtue of the authority in me vested, in consideration of the premises, as well as in consideration of the sum of one dollar in hand paid, the receipt of which is hereby acknowledged, have granted, bargained, aliened, sold enfeoffed, and sold, and by these presents do grant, bargain, sell, alien, and enfeof to the said parties of the second part, their heirs, executors, administrators, and assigns all of the above described first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-

first, thirty-second, thirty-third, thirty-fourth, and thirty-fifth tracts of land, except the west half of the southwest quarter, and the southwest quarter of section thirty, in township nine, south, in range nineteen, west, and the southwest quarter of section three, in township ten, south, in range twenty, west, and the west half of the northwest quarter of section nine, in township nine, south, in range twenty, west, hereby granting and conveying to the parties of the second part all the right, title, and interest of the said A. and B. Ashbrook, Robertus Wilson, P. Sappington, Gabriel W. Denton, John S. Skinner, Henry Ogden, and William C. Emmett, and all and every person or persons, whomsoever in the same, together with all the tenements and hereditaments. To have and to hold the said land to the parties of the second part, their heirs, executors, administrators, and assigns forever, as fully and absolutely as I, the said George W. Wells, as sheriff as aforesaid and under the authority aforesaid, might, could, or ought to sell and convey the same.

In testimony whereof, I, the said George W. Wells, as sheriff as aforesaid, as such sheriff, have hereunto set my hand and seal on the day and year, first above written.

G. W. WELLS, [SEAL]
Sheriff, Clark County, Ark's.

Signed, sealed, and delivered in
the presence of
J. O. YOUNG,
JOSHUA PHILLIPS,

The State of Arkansas, }
County of Clark. }

Be it remembered, that on this 15th day of January, in the year eighteen hundred and forty-seven, personally appeared before me, Joshua Phillips, an acting justice of the peace in and for the county of Clark, George W. Wells, sheriff of the said county, to me personally well known, who stated and acknowledged that he executed the within and foregoing deed for the uses and purposes therein mentioned and set forth, and by virtue of authority therein recited.

JOSHUA PHILLIPS, *J. P.*

The State of Arkansas, }
County of Clark. }

I, Isaac W. Smith, clerk of the Circuit Court and ex-officio recorder in and for the county of Clark, in said State, do hereby certify that the foregoing deed was filed for the record in my office on the 15th of January, 1847, and the same is now duly recorded in record book F., pages 378, 379, 380, 381, 382, 383.

In testimony whereof, I have hereunto set my hand as

[SEAL.] clerk and ex-officio recorder as aforesaid, and affixed the seal of said court, at Arkadelphia, this the 5th day of February, A. D. 1847.

J. W. SMITH,
Clerk and ex-officio Recorder.
By JNO. S. T. CALLAWAY, *D. C.*

Upon which is the following endorsement:
Filed September 17th, 1856.

J. W. SMITH, *Clerk.*

Clark Circuit Court, September Term, A. D. 1847.

Be it remembered, that before the Honorable Christopher C. Scott, chancellor, sitting on the chancery side of the Circuit Court of Clark county, in the State of Arkansas, the following proceedings were had, to wit:

Benjamin S. Duncan and Harris Flanagin
vs.
G. W. Denton.
} Petition for Title.

Come the said complainants, by their solicitors, and on their motion this cause is continued.

Clark, *sct.*

Clark Circuit Court,
September Term, A. D. 1847, in Chancery.

To the Honorable the Judge of the Circuit Court in and for the county of Clark, in Chancery sitting:

Your petitioners, Benjamin S. Duncan and Harris Flanagin, would respectfully represent that there lay in the county of Clark, in the State of Arkansas, on the first of January, A. D. 1842, subject to taxation, the following described lands, to wit:

The west quarter section one.

The north half of section two, in township nine, south, in range twenty-two, west.

Section twenty-four.

The east half of the southeast quarter of section twenty-two, west, in township eight, south of range twenty-two.

The west half of the northeast quarter of section thirty-two.

The northeast quarter of section thirty-one.

The west half of the southwest quarter of section twenty-nine, all in township eight, south of range twenty-one, west.

The southeast quarter of section twenty-three, in township eight, south, of range twenty-two, west.

The north half of section eighteen.

The southwest quarter of the southeast quarter of section thirty, in township eight, south of range twenty-one, west.

The northwest quarter of section thirty-five.

The west half of the northeast quarter of section thirty-five.

The east half of section thirty-four.

The south half of section thirty-five, in township eight, south of range twenty-two, west.

And they would further represent, that the first, sixth, eighth and eleventh of said tracts contained one hundred and sixty acres each, and the second, ninth, thirteenth and fourteenth of said tracts contained three hundred and twenty acres each, and the third of said tracts contained six hundred and forty acres. And the fourth, fifth, seventh and twelfth of the said tracts contained eighty acres each, and the tenth of said tracts contained forty acres.

And they would further represent, that said lands were entered and listed for taxation in the year eighteen hundred and forty-two by the Assessor of Clark county, as the property of Gabriel W. Denton.

And they would further represent, that neither the owner, nor any person for him, paid the State and County taxes for the year eighteen hundred and forty-two, within the time prescribed by law, which State and County taxes amounted, with the penalty and costs, which afterwards accrued thereon in the first, sixth, eleventh and eighth of said tracts, to the sum of two dollars and seventy-five cents each. And on the second, ninth, thirteenth and fourteenth of said tract to five dollars and twenty-three cents each. And the third of said tracts to the sum of ten dollars and eighteen cents. And the fourth, fifth, seventh and twelfth of said tracts to the sum of one dollar and fifty-one cents each. And on the tenth of said tracts the sum of ninety cents.

And they would further represent, that the said Gabriel W. Denton had no personal property within the county of Clark, whereon to levy and make distress for the same, and that he was a non-resident of the State of Arkansas. And they would further represent, that Willis S. Smith, who was then sheriff of the county of Clark in the State of Arkansas, did proceed to advertise and give at least thirty days public notice that he would sell at public auction, on Monday of the tenth day of November, A. D. 1842, at the Court House door in the town of Greenville, that being then the county seat of the county of Clark, each of said tracts of land or so much of each as would be sufficient to pay the taxes, costs and penalty due on each of said tracts for the year A. D. 1842, which said advertisement, containing the name of the person purporting to be the owner and a particular description of each of said tracts of land and the amount of taxes, costs and penalty due on each of said tracts assessed, and was published in the Arkansas Times and Advocate, a newspaper published in the city of Little Rock, and was also set up at the Court House door in the said county of Clark at least thirty days previous to the said day of sale, and on the said day of

sale and on the said seventh day of November, the said taxes, penalty and costs still remaining unpaid, the said Willis S. Smith, the then sheriff as aforesaid, did proceed to sell at public auction said several tracts of land, or so much of each of said tracts of land as would be sufficient to pay the taxes, cost and penalty due on each of said tracts as aforesaid. Whereupon your orators bid and offered to pay the taxes, penalty and costs due on each of said tracts of land respectively for each of said tracts, and no person bidding or offering to pay the taxes, penalty and costs due on either of said tracts of land, for less than the whole thereof, the said several tracts of land were each then and there stricken off to your orators. And they would further represent, that said State and County taxes, penalty and costs were severally paid to the said sheriff, which was evidenced by certificates of said sheriff, given to your orators, and which has since been given up to the sheriff of Clark county upon his executing to them a deed of conveyance for the same.

And they would further represent, that on the fifteenth day of January eighteen hundred and forty-seven, and being after the expiration of one year from the time of said sale, the said Gabriel W. Denton, not having, nor any person for him, made an offer to redeem said lands according to the laws of the said State of Arkansas. Your orators presented to the sheriff of Clark county George W. Wills, successor to the said Willis S. Smith, the several certificates for said several tracts of lands, and demanded a deed for the same, which he executed, a copy of which is hereto annexed and marked Exhibit A., which your orators pray may be taken as part of this petition. And they would further represent, that they have caused to be inserted in the Washington Telegraph, a newspaper published in the State of Arkansas, a notice, for three successive weekly insertions, the last of which was at least six months previous to the first day of the present term of this Court, which notice contained a true description of the said several tracts of land, the price for which each of said tracts of land were sold, the authority under which said sale took place and the nature of the title by which said land was held, and called upon all persons who could set up any right to the lands so purchased, in consequence of any informality, irregularity or illegality connected with such sale, to show cause at the present term of this Court why the sale so made should not be confirmed.

Your orators, therefore, humbly pray, that your Honor will confirm the sale so made to them under the laws of the State of Arkansas, and your orators, in duty bound, will ever pray, &c.

H. FLANAGIN,
Pro Petitioner.

Clark Circuit Court, March Term, A. D., 1848. A decree was entered in the following words and figures, to wit:

Benjamin S. Duncan, Harris Flanagin, *vs.* Gabriel W. Denton. } 34 Petition for Confirmation of Tax Title.

Came the complainant, and the defendants solemnly called, came not, and it appearing to the Court here, as well by the petition in the cause as by the deed of the Sheriff of Clark County to said complainants, that the following described land, to wit:

The northwest quarter of section one (1). The north half of section two (2) in township nine south, in range twenty-two west. Section twenty-four (24). The east half of the southeast quarter of section twenty-two (22) in township eight (8) south, in range twenty-two west. The west half of the northwest quarter of section thirty-two (32). The northeast quarter of section thirty-one. The west half of the northwest quarter of section twenty nine (29), all in township (8) south, in range twenty-one (21) west. Southeast quarter of section twenty-three (23) in township eight (8) south, in range twenty-two (22) west. The north half of section eighteen (18). The southwest quarter of the southeast quarter of section thirty (30) in township eight (8) south, in range twenty-one west. The northwest quarter of section thirty-five (35). The west half of the northeast quarter of section thirty-five (35). The east half section thirty-four (34). The south half of section thirty-five (35) in township eight (8) south, in range twenty-two (22) west, lying in the County of Clark, and was subject to taxation in the year eighteen hundred and forty-two, and they were entered and listed for taxation in said year in the name of the defendant, who is a non-resident of the State of Arkansas, and had no personal property within the County of Clark, and that the taxes were wholly unpaid by said defendant, and that said lands were advertised in conformity with the laws of the State of Arkansas, and sold the whole of each of said tracts of land for the taxes, penalty and costs, which had accrued, and were due on each of said tracts of land respectively, which sale was held on the seventh day of November, eighteen hundred and forty-two, and at said sale, the complainants, with one Benjamin L. Britton, became the purchaser, and that on the fourth day of November, eighteen hundred and forty-three, the said Benjamin L. Britton, transferred all his title, interest and claim, to each of said tracts of land, to the complainants, and that no person offered to redeem said several tracts of land for more than one year, and that on the fifteenth day of January, eighteen hundred and forty-seven, the Sheriff of Clark County executed to them a deed for said land, and it appearing to the chancellor by evidence here introduced, that since said deed was executed the said com-

plainants caused to be inserted in the Washington Telegraph, a newspaper published in the State of Arkansas, a notice for six successive weekly insertions, the last of which was at least six months previous to the first day of the present term of this Court, setting forth the authority under which the sale took place, contained the same description of the land as that given in the deed of conveyance, declared the price at which each of said tracts of land were purchased, and the nature of the title by which they were held, and called upon all persons who could set up any right to the land so purchased, in consequence of informality or any irregularity, or any illegality connected with such sale, to be and appear before this Court at the last term thereof, and show cause why the sale so made should not be confirmed, and the said defendant at the last term and at the present, having wholly failed to appear before this Court, and he being solemnly called and not appearing, it is therefore ordered, adjudged and decreed, that said sale of lands, so made, be and the same is hereby absolutely confirmed, and it is further ordered, adjudged and decreed, that all the title and claim of the said Gabriel M. Denton, as well as that of all other persons, be and the same is absolutely vested in the complainants.

Upon which is the following endorsement.

Filed, Sept. 17th, 1856.

J. W. SMITH,
Clerk.

And afterwards, to wit, on the 21st day of September, A. D., 1856, at and during the September Term, A. D., 1856, the following proceedings were had in the foregoing case before the Honorable Abner A. Stith, Judge thereof, to wit:

Record Entry.

James E. M. Backman, Thos. D. Kingsbury, and James L. Witherspoon, executors of H. K. Hardy, Complainants,
vs.
Benjamin S. Duncan and Harris Flanagin, Defendants.

Came said complainants and defendants, by their respective solicitors, and by consent, the said complainants file their amendment to said original bill, sworn to by James L. Witherspoon, which is accepted as sufficient, and by consent it is ordered that the answer of defendants, and the plea and demurrer thereto contained, shall stand, and be received, as also the answer, plea, and demurrer to the amendment, whereupon said complainants enter in short upon the record their replication to the answer of said defendants, and their cause is thereupon set down for hearing at the next term of this Court, until which time this cause is con-

sidered with leave for either party to take depositions generally to be read in evidence at the final hearing of this cause.

Executors of Henry K. Hardy, deceased,
Complainants,
vs.
Benjamin S. Duncan and Harris Flanagin,
Defendants.

In the Circuit Court of Clark County, in Chancery, September Term, A. D. 1856.

To the Honorable A. A. Stith, Judge of the Sixth Judicial Circuit, and as such exercising jurisdiction.

Amendment to Bill.

Amendment to the original bill herein, on the part of the complainant, filed by consent of defendants.

Your orators, further complaining, show that they are informed and believe that at the March term, A. D. 1848, of the Circuit Court of Clark county a certain decree was rendered on the chancery side of said Court, whereby, upon certain proceedings had in said Court, said Court decreed that the sale for taxes made by the said sheriff of Clark county, as in said bill of complaint alleged and set forth, was in all things affirmed, and by said pretended decree it was adjudged that all claim, right or title of said Denton, or of any other person whatsoever in and to the tracts of land now in controversy, should be vested in defendants; and these complainants aver, that said decree was based solely upon the sale of said land for taxes as the property of said Denton, as in said bill of complaint alleged and in no other manner whatsoever, and that the same is wholly inoperative and void and is furthermore in all respects informal and insufficient and not authorized by law; and said complainants submit to the Court here whether said decree set forth and exhibited, with the answer of defendants herein, does or can by law and upon the supposed facts therein and in said answer recited and set forth, convey and test any title whatsoever in and to said two quarter sections of land in the said Duncan and Flanigan; and said complainants further insist, that upon the facts stated in said original bill and to which this is an amendment, the said Gabriel S. Denton had no interest in said land subject to taxation, and that such decree of confirmation of the sale of his supposed interest thereon was and is wholly inoperative and void as against the heirs of said Timothy Harrell, and did not in any wise affect or impair the title by them acquired, subsequently to said sale, for taxes upon the confirmation of the said claim to said land as a donation and the consequent issuance of said patent to them for the same. Nevertheless, your orators represent that said void decree

remains in the said Circuit Court of Clark county in chancery, a cloud and an incumbrance upon the title of complainants as such executors, and they are informed and believe and that said Duncan and Flanigan assert and pretend to have title to and to be the owners of the same, whereby a doubt is liable to be cast on the title of your orator and the value of his said lands greatly lessened and injured; and your orator is advised that it is meet and proper that such cloud and incumbrance should be removed, and the title to said lands settled and guided. And your orator, reiterating and re-stating all the allegations and charges in said bill of complaint contained to be true, prays that this may be received and accepted as an amendment thereto, and praying the full benefits of the prayer thereof, furthermore pray, in addition to said prayer in said bill contained, that said decree of the Circuit Court of Clark county in chancery may be in all respects vacated, superseded and held for nought, and as in duty bound your orator will ever pray, &c.

WALKINS & GALLAGHER,
Solicitors for Complainant.

State of Arkansas, } *sct.*
County of Clark. }

I, James L. Witherspoon, do solemnly swear that the matters and facts above set forth, as of my own knowledge, I know to be true, and as upon the information of others I believe to be true, so help me God.

JAMES L. WITHERSPOON.

Sworn to and subscribed before
me, September 23d, A. D. 1856.
J. W. SMITH, *Clerk.*
By W. M. RANDOLPH, *Deputy Clerk.*

Upon which is the following endorsement.

Filed September 23d, 1856.
J. W. SMITH, *Clerk.*
By W. M. RANDOLPH, *Deputy Clerk.*

And afterwards, to wit, on the 19th day of March, A. D. 1857, at and during the March Term, 1857, the following proceedings were had in the foregoing case by me, the Honorable Abner A. Stith, Judge thereof, to wit:

Record Entry.

Executors of Henry K. Hardy
vs. } 118.
Benjamin S. Duncan and Harris Flanigan.

On this day came the said parties, by their respective solicitors, and filed their agreement signed by said solicitors, which is or-

dered to form a part of this record of this cause, and thereupon this cause came on to be heard upon the bill and amendment thereto, and the answer to said bill and amendment, and the replication to said answer, and the exhibits referred to in said bill and answer and upon said argeement, and was argued by counsel on consideration whereof, the Court here is of opinion and doth accordingly order, adjudge and decree that there is no equity in said bill, and the same ought to be and is hereby dismissed; and it is further ordered, adjudged and decreed that said defendant recover of said complainants, as such executors, their cost in this behalf expended; whereupon the said complainants pray an appeal to the Supreme Court from said decree, and no affidavit being required it is ordered that said appeal be granted.

In the Circuit Court of Clark county in Chancery, at the March Term, A. D. 1857.

Agreement with Parties.

James E. M. Backman, Thomas D. Kingsbury and James L. Witherspoon, Executors of Henry K. Hardy, deceased, Complainants, *vs.* Benjamin S. Duncan and Harris Flanigan, Defendants. } In Chancery.

Agreement of Parties.

It is agreed by the parties to this cause, as follows, that all the allegations contained in the bill respecting the donation claim of Timothy Harrell and the title of Hardy, and which by his will has become vested in his executors to the half section of land in controversy, shall be taken as true; that all the allegations in the answer respecting the tax title of the defendants to said tract of land shall be taken as true, the complainants making no question as to the formality and regularity of the proceedings by which such title may have acquired, and in respect of any question of the statute of limitations presented in this case the following facts are agreed upon:

That Elizabeth Harrell in 1839, married Elias Hays, who is still living, she died in August, 1845, aged twenty-four years, leaving her only children and heirs, Archibald T. Hays, then aged five years, and Spence H. Hays, then aged two years, that on the 7th day of November, 1842, William Harrell was nineteen years old. That Isham Harrell died in 1849, aged twenty-four years. That the land in controversy is wild land of which no person has ever been in actual possession. The complainants maintain that the tax, title and confirmation of it, under which the defendants claim, is void, so that they acquired no title

thereby, and that they are not entitled to any benefit of the statute of limitation; the defendants maintain the reverse of these propositions, the parties mutually submit to the Court to decide what are their respective rights in the premises.

WALKINS & GALLAGHER,
for Complainants.

CUMMINS & GARLAND,
for Defendants.

State of Arkansas,
County of Clark.

I, Newton L. Love, Clerk of the Circuit Court in and for the county and State aforesaid, do hereby certify that the foregoing pages numbered from one to ninety-one, contain a perfect, true and complete transcript of the record and proceedings of said Court in the case therein stated.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Court, at my office in the [SEAL.] city of Arkadelphia, this fifteenth day of June, A. D. 1857.

NEWTON L. LOVE,
Clerk.

By FRED. M. GREEN,
Dep. Clerk.

And on the 18th day of July A. D. 1857, at and during the July Term, of said Supreme Court. A. D. 1857, the following proceedings were had, to wit:

James L. Witherspoon, et al., Exor., Appellants,
vs.
Benjamin S. Duncan. et al., Appellees.

Appeal from Clark Circuit Court in Chancery.

Motion to Assignment of Errors.

At this day come said appellants by their solicitor, and on motion it is ordered that this assignment of errors be filed, and therefore, the same is filed, which is in the following words, to wit:

And the said appellants come and say that the record and proceedings of the aforesaid suit here, there is manifest error in this, to wit:

That said Court of Chancery dismissed the bill of complaint of the appellants upon the hearing, and decreed that they were not entitled to the relief or to any relief thereby sought; whereas by law the complainant was well entitled to relief, and such decree should have been in favor of the appellants and against the appellees.

And for these and other manifest errors apparent, &c. They pray that the decree here appealed from, may be reversed, annulled, &c. And they restored to all things they have lost thereby, and that the appellees may rejoin, &c.

WALKINS & GALLAGHER,
for Appellants.

And afterwards, to wit: on the 25th of July, A. D. 1857, at and during the July Term of said Supreme Court, A. D. 1857, the following proceedings were had, to wit:

James L. Witherspoon, et al., Exor., Appellants,
vs.
Benjamin S. Duncan, et al., Appellees.
} Appeal from Clark Circuit Court in Chancery.

Joinder in Error.

At this day come said appellees by their solicitor and on motion it is ordered that their joinder in error be filed, and thereupon the same is filed, which is in the following words, to wit:

Come said appellees and say that in the record and proceedings as well as in the rendering of the decree in this cause in the Court below, there is no error.

Wherefore they pray the same to be affirmed with costs, &c.

FLANAGIN & GARLAND,
for Appellees.

And afterwards, to wit: on the 13th day of August, A. D. 1857, at the July Term of said Supreme Court, A. D. 1857, the following proceedings were had, to wit:

James L. Witherspoon, et al., Exor., Appellants,
vs.
Benjamin S. Duncan, et al., Appellees.
} Appeal from Clark Circuit Court in Chancery.

Record Entry.

At this day come said appellants and appellees by their solicitors and this cause is submitted on briefs, and by the Court taken under advisement.

And afterwards, to wit: on the 21st January, A. D. 1858, at the January Term of said Supreme Court, A. D. 1858, the following proceedings were had, to wit:

James L. Witherspoon, et al., Exors., Appellants,
vs.
Benjamin S. Duncan, et al., Appellees.
} Appeal from Clark Circuit Court. in Chancery.

At this day come said appellants and appellees by their solicitors, and their cause is submitted on the briefs filed, and the Court taken under advisement.

And afterwards, to wit: on the 16th day of June, A. D. 1860, at the May Term of said Supreme Court, A. D. 1860, the following proceedings were had, to wit:

James L. Witherspoon, et al., Exor., Appellants,
vs.
Benjamin S. Duncan, et al., Appellees.
} Appeal from Clark Circuit Court in Chancery.

Decree.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Clark County in Chancery, and was argued in this Court by the solicitors of the parties. On consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said Circuit Court in Chancery in this cause.

It is, therefore, ordered and decreed that the decree of said Circuit Court in Chancery in this cause be, and the same is hereby in all things affirmed with costs. It is further ordered and decreed that said appellees recover of said appellants, all their costs in this Court in this cause expended and have execution thereof.

In testimony that the foregoing eighty-six pages contain a full, true and correct transcript of the record and proceedings of said Supreme Court in said cause, briefs of counsel and opinions of Court excepted.

I, Luke E. Barber, Clerk of said Supreme Court, hereto set my hand and affix the seal of said Court, at my [SEAL.] office in the city of Little Rock, this tenth day of October, A. D. 1860.

L. E. BARBER,
Clerk.

In the Supreme Court of the United States,

DECEMBER TERM, 1866.

No. ——

The Executors of H. K. HARDY, Plaintiffs vs. Duncan and Flanagin, Defendants.

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

Argument for Defendants.

ARKANSAS GAZETTE, PRINT.

ARGUMENT FOR DEFENDANTS.

—o—

The bill of complaint, filed March 20th, 1856, states, that under an act of Congress, entitled an act to aid the State of Ohio, in extending the Miami canal, &c., &c., &c., one Timothy Harrell was entitled to enter, not exceeding two quarter sections of land: said Harrell departing this life before the entry was made, his heirs made the same, before the proper officer, of these lands, viz: south-east quarter of section 23, and south-west quarter of section 24, township 8 south, range 22 west, 320 acres, situate in Clark county, Arkansas: entry allowed 22d May, 1830; certificate of entry not confirmed by the General Land Office, for some supposed reason, until February 5th, 1846, confirmed on that day, and patent issued, (copy of proof before said Land Officers, and their opinions filed as exhibit A. to the bill, copy of patent as exhibit B,) Elizabeth, William, and Isham Harrell, heirs of Timothy. Previous to 1842, Elizabeth married Elias Hays, and died, leaving Archibald Y. and Spencer H. her children, then minors, and have ever since been. 12th July, 1853, Elias Hays, guardian of these children, petitioned for partition of said lands—decree for partition granted—lands had to be, and were sold to make the partition, and Hardy purchased them at Commissioner's sale; sale approved March, 1854, by the court. This sale conveyed only the interest in said lands of Archibald Y. Hays and William Harrell, (copy of deed exhibit C. filed.) Isham Harrell died in 1849. April, 1854, his administrator petitioned to sell his interest in said lands—petition granted—land sold, and Hardy purchased; deed made to him, (copy filed as exhibit D,) 8th of June, 1836. Ga-

briel W. Denton entered part of said lands, viz: section 24, and south-east quarter section 23. Such entry is regular as far as is known. Said lands were listed and assessed for taxation, in the name of said Denton, for 1842. On 15th January, 1847, George W. Wells, sheriff of Clark county, made his deed for section 24, and south-east quarter of section 23, for taxes due 1842, to Duncan and Flanagin, they purchasing the same at tax sale, (copy of deed filed, E.) Commissioner of the General Land Office cancelled Denton's entry, and refunded his money—Land entered by Timothy Harrell, never in possession of any one—vacant. At tax sale of 1842, the heirs of Timothy minors, or some of them, and he claims benefit thereof; insists that deed of Duncan and Flanagin is of no avail—prays for answer—the deed to be set aside—and for deed from them to him, (Hardy.) Amendment to the bill filed September 23d, 1856—states that the decree of the court, of March, 1848, confirming sale to Duncan and Flanagin, is void, because based on Dentons's entry, &c., reiterating charges in the bill, &c.

Answer of Duncan and Flanagin filed 17th September, 1856, states—defendants have no knowledge of the facts alleged in the bill, with regard to Harrell's donation, but suppose them severally true; believe patent issued; but deny that it was suspended except as others to await objections of occupants: patent was issued on testimony first taken, not on additional proof: admit heirs of Harrell and William Hays to be correctly set forth—don't know that exhibits A and B to the bill are correct. Admit suit for partition, purchase of Hardy, but don't know that it was regular: exhibit C to the bill is correct, as far as it goes, but lacks certificates necessary—admit death of Isham Harrell, in or about 1849; deny administration on his estate in Clark—he had no property where letters were granted, and therefore they were void—admits application for sale of Harrell's interest, and sale was made: deed executed. Exhibit D is a true copy of the deed, but wants certificates. Denton's entry was made in ignorance of Harrell's claim—admits assessment and sale of lands, and deed truly exhibited—Denton's entry set aside, and purchase money refunded: lands in no one's

occupation; no one cultivating: deny minority of Harrell's heirs: deny that Hardy ever asked them to quit-claim: admit they claim the land: lands assessed in Denton's name—no one paid taxes before 1842; assessing and proceedings regular; sheriff and collector filed in the clerk's office the list required by law; due notice given in a newspaper, published in the State; (*The Times and Advocate*,) Brittin, Duncan and Flanagin, bid in the land and paid purchase money; clerk of the Clark Circuit Court attended, and took minutes of the sale—Brittin endorsed his interest to Duncan and Flanagin, copy thereof as X, 1; deed of Wells, sheriff, to Duncan and Flanagin, with ordinary acknowledgment, &c.; copy of this deed Exhibit X, 2; set up petition and decree of confirmation of such sale; copy thereof Exhibit X, 3.

Duncan and Flanagin insist, that the facts necessary to complete title of Harrell, were existing in 1830—and, in granting the patent, it was merely decided these facts were sufficient: the patent issued in 1846, did not affect their claim, because the Department decided the deed belonged to them, so as to locate the entry made by Denton in 1836. If the tax sale was regular, their title was, and is perfect; and infancy is no excuse for not redeeming lands; cultivation of 5 years since their purchase at tax sale; three years after disability removed, if any existed; decree of confirmation conclusive on the Statute of Limitation generally as to all. Hardy had his claim one year before commencement of suit; ad demurrer clause to the bill.

At September term, 1856, replication was entered to the answer, and the cause was set down for hearing, &c.

At March term, 1857, the solicitors for both parties entered into an agreement as to the facts in the case, and had what is termed "an agreed case," as to the facts, and upon the agreement, bill and exhibits, answer and exhibits, and amendment to the bill and replication to the answer, the case was heard, and a decree rendered dismissing the bill, from which the executors of Hardy appealed to the Supreme Court of Arkansas, where the decree was affirmed, and Hardy's executors bring the case here on writ of

error to be reviewed. The *agreement* of counsel alluded to in the record is:

That all the allegations in the bill as to Timothy Harrell's donation and Hardy's title are true; the allegations in the answer respecting the tax sale, and title thereunder are true, and no question is raised as to the formality of the proeeedings. Elizabeth Harrell, in 1839, married Elias Hays, who is now alive; she died in August, 1845, aged 24 years, leaving Archibald Y. and Spencer H., first aged 5, and second aged 2 years. On 1st November, 1842, William Harrell was 19 years old. Isham Harrell died in 1849, aged 24 years. The land in controversy is wild, and has not been in the actual possession of any one. Hardy's executors maintain that the tax title and confirmation of it, under which Duncan and Flanagin claim title is void; so that no title passed by virtue thereof, and therefore they can have no benefit of the limitation. Defendants maintain the reverse of these propositions.

This is the condensed record of this cause, the bare statement whereof, we think, shows clearly that the decree of the Circuit Court in Chancery is correct, as is also the decision of the Supreme Court of Arkansas.

As to the proceedings under which the tax sale was confirmed, by the agreed state of case, there is no question raised, but their formality is admitted. Even if there should be a question as to their formality, in the absence of any proof touching the facts, the deed of the sheriff and ex-officio assessor and collector is evidence, according to *Pillow vs. Roberts*, 13 *How. U. S. S. C.* 477, and *Parker vs. Overman*, 18 *How.* 137, but when a confirmation of the sale has taken place, it becomes conclusive, as *res adjudicata*, and must be impeached by the strongest kind of evidence directly, to set it aside, of which there is none here. *Thacker vs. Chambers*, 5 *Humph.* 313, 314; *People vs. Downing*, 4 *Sandf.* 189; *Wiley vs. Kelsey*, 9 *Geo.* 117; *McPherson vs. Cunliffe*, 11 *Serg. & R.* 422; *Wallace vs. Brown*, 22 *Arks*, 118. And we stand upon the decree of confirmation, so far as anything appears here affecting it, without the slightest fear or uneasiness.

But plaintiffs say, the matter is void from beginning, and therefore no title can possibly vest under such a state of proceedings.

1st. That the land was assessed and taxed in the name of person not the owner. This objection has no force whatever. *Gould's Digest, p.* 948, *sec.* 106, is express; *that taxes shall be levied on lands, notwithstanding any change of title, &c.* It is plain then by this section, that, other things being correct, the name, in which the assessment is made, is of no importance—the lien created in favor of the tax cannot be defeated or displaced by this means. Besides the letter of our statute law, we refer the court to the well considered opinion in *Merrick & Fenno vs. Hutt*, 15 *Ark.* 340, as affirming this statute; wherein it is said by the judge delivering the opinion; *the name of the owner is comparatively unimportant.* We think, however, it is not worth while to say more on this point, and that plaintiffs will not seriously insist on it.

2d. At the time the land was assessed, the fee was in the United States, and it was not therefore subject to taxation. This point was urged in the court below, with much earnestness, and doubtless will be here; and although there may be some technical plausibility in the position, yet, we think it equally untenable as the one first mentioned. Just in so many words, they say, that not until the 5th of February, A. D. 1846, the day on which the patent issued to Harrell's heirs, was this land subject to taxation, although the entry was allowed before the proper Land Officer, 22d May, 1830, a period of sixteen years. What title did they acquire under the certificate of entry of 1830? How is a party regarded who holds this certificate of entry? Decisions of courts of high standing will answer better here, we suppose, than any theory or opinion of our own. In the well known case of *Bagnell et al. vs. Broderick*, 13 *Peters* 436, it is held that: *there is no doubt of the power of the States to pass laws to authorize purchasers to prosecute actions of ejectment on certificates of purchase, &c.* Also 3 *Dallas* 457. Although we will not contest the able opinion in *Wynn vs. Garland*, 16 *Ark.* 440, in which it is said,

all entries are *in fieri* until sanctioned by the President by the issuance of the patent, yet, we take the ground that lands purchased and paid for, at the land offices, are not thereafter the property of the United States. The United States cannot withhold the patent, except in a few specified cases, as where the sale was illegal—where a prior sale or reservation, or a prior grant may have been made—where the land may not have been offered at public sale, or directed by the government to be withheld from sale. These are rare exceptions, and do not affect or impair the general principle, that, as soon as the public land is purchased and paid for, it becomes the property of the purchaser, and may be sold and transferred by him (as is constantly the case,) before patented. In *Carroll vs. Safford*, 3 *How. U. S. S. C.* 460, the court, in speaking of the title under a certificate, says: *When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a certificate, which could no more be cancelled than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect, there is no difference between the certificate holder and the patentee.* This, we deem conclusive as to the rights of a person under a certificate. And it was decided in 3*d McLean C. C. Rep.* 107, that a certificate could no more be disregarded than a patent. These two cases will be noticed more at large as we come to discuss the question directly, whether lands for which there is merely a certificate of entry issued, can be taxed?

In *Goodlett vs. Smithson*, 5 *Porter* (*Ala.*) 245, it was decided, with great force and point, that: *The patent is considered as evidence of title, by which it is shown, that the prerequisites of sale have been complied with—by the act of entry and payment, the purchaser acquires a legal title, that may be aliened, descend or divested, in the same manner as any other legal title. So, previous to the issuance of a patent, the estate of one in lands purchased of the United States, and for which he has received a certificate of*

payment, may be levied on and sold under execution, issued on a judgment at law, and ejectment can be maintained on such certificate—citing 2*d Porter* 337; 3 *id.* 363, and other authorities. And the laws of Arkansas give as much real benefit under a certificate of entry, or under an entry like the one here spoken of, as the laws of any other State; and, in truth, they are very similar to all the laws of other States on this subject: *Gould's Digest, p.* 459, *et seq.*; *Hale vs. Gaines et al.*, 22 *How.* (*U. S. S. C.*) 144.

With such rights under a certificate of entry, would it not be strange, indeed, and is there any good reason for it, that the lands for which this certificate was given, should not be subject to taxation? We are told, *that the right of taxation is an incident of sovereignty — a paramount right, and it cannot be defeated. Blackwell on Tax Titles* 9. *And it exists against all persons or property, id.* 40, 101; 4 *Peters* 563; *and any right to the land, perfect or inchoate, constitutes ownership and is taxable. Blackwell* 495–6. If this be law, (and certainly it comes from one, who favors in no kind of degree, tax titles—there is none more strongly opposed to them than he,) surely, land under a certificate of entry can be taxed. To say the least of it, from the authorities cited above, a person holding under a certificate of entry has more than an inchoate right. Then we are here forced to the conclusion, that such land is taxable. It would be very extraordinary if an individual could purchase lands of the United States, settle, improve and cultivate them, on certificates of purchase, and yet, because, from the neglect and delay of the proper department, the patents are not issued for several years, they are exempt from taxation, while his neighbor was compelled to pay taxes, when he was deriving no greater advantage from the possession and cultivation of his land. A most unreasonable idea. Just think of it for a moment in this case. A period of sixteen years elapses, during which time he might have improved and cultivated the land, derived a subsistence from it, made and accumulated property on it, and might have well nigh worn it out, and yet, he must not pay taxes. Such, Harrell, or his heirs, did not do, but such a thing is possible, and easily to be done. And if this

be the law, really there is a very great consideration offered, and held out, to induce persons not to get patents issued at all. And when the patent is issued, who knows it? It may well be kept to himself (patentee,) without the knowledge of any save the Department at Washington City. The door opened by this doctrine, for depriving the State of rightful revenue, is too wide—such will not do. But, to the point as adjudicated. *Carroll vs. Safford*, cited above, came up from Michigan, and the great objection raised there was, that until the patent issued, the land was the property of the United States, and taxing it was in violation of the ordinance of 1787, which inhibited taxation of lands of the United States, and numerous opinions of Attorneys General of the United States are cited, as well as the act of 12th of January, 1825, to show that such land, until patent is issued, is the property of the United States. The act of January 12, 1825, merely makes provision for refunding money, where the entry is not confirmed, and is silent as to any right further than this. *Peters U. S. Statutes at Large, 4th vol., p.* 80. The court will see that the same provision touching taxation in this respect, is alike as to lands here and in Michigan. Taxes, in Michigan, are regulated under the ordinance of 1787, so far as interfering with the soil of the United States. or taxing her property. The *Statute of Arkansas, p.* 930, *Gould's Digest, sec.* 1, says: Taxes shall be levied on the following objects: 1st, all lands with the improvements thereon, except such as are exempt from taxation by the compact between the State and the United States, &c.; and that compact, (*p.* 67, *Gould's Ark. Digest,*) among other provisions, has this: *No tax shall be imposed on lands the property of the United States.* Then the same inhibition is in Michigan as here. The Court, in that case said: *It is said, the fee is not in the purchaser, but in the United States, until the patent shall be issued—this is technically so at law, but not in equity. Now, lands which have been sold by the United States can, in no sense, be called the property of the United States—they are no more the property of the United States than lands patented—the rights of the purchaser are protected as fully under the patent certificate, as under the patent.*

When sold, the Government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; the Court think the land liable to taxation. This case was thoroughly argued by counsel, and well digested by the court, as appears from the report of it, and as it will, in all probability, be cited by the plaintiffs, and the attention of the court particularly called to it, we will make no further use of it. We think it conclusive on this point, and places the question beyond all cavil. The plaintiffs will doubtless argue, that this case arising in Michigan, cannot control cases in Arkansas; but from analogy, if nothing else, the case would be of great weight; but as the same provision in the ordinance of 1787, is contained in our compact, and that was the point principally relied on in that case, by those opposed to taxing the land, we cite it as binding authority in this cause. But we still have high authority in favor of our position. In *Gwynne vs. Niswanger*, 20 *Ohio* 556, it was ruled that: *Where a party has made an entry, and survey of lands under a warrant, such lands become subject to taxation; and if sold for taxes, the purchaser, at such sale will take a legal title as against the former owner*, ALTHOUGH THE PATENT HAS NEVER ISSUED FROM THE UNITED STATES. This case went up to the Supreme Court of Ohio several times, and is reported besides in 20th Ohio, in 13th and 15th Ohio, and the court each time held this doctrine. In the case at bar, as in the one just alluded to, the land was surveyed, entered, and Harrell's heirs held a certificate, just as high a title as is shown in the Ohio case. And in Ohio, the same ordinance of 1787 made exceptions as to lands not taxable, just as we have seen in Michigan, and the same as is contained in the Arkansas compact with the United States.

In *Astrom et al. vs. Hammond*, 3 *McLean C. C. R.* 107, it was held that: *Land purchased from the United States and paid for, is liable to be taxed, and applies to estates legal and equitable—the final certificate can no more be disregarded by the Government than a patent;* precisely a similar case as we have now before this court.

In *Carroll vs. Perry et al.*, 4 *McLean C. C. R.* 25, it was ruled

that: *Lands purchased of the United States, and paid for, though not patented, may be taxed by a State.* The case cited above from Ohio, went up so often on the question of what kind of right the purchaser held—whether he could enforce the same in law or equity, &c., but the court never, from the beginning, swerved from the position, that the land was liable to taxation, before patent had issued. The same doctrine was before that repeatedly held in Ohio, incidentally and directly. *Lessee of Wallace vs. Lemon & Renick*, 7 *Ohio* 156; *Lessee of Street vs. O'Parrish*, 6 *Ohio* 477. And in *Douglass vs. Dangerfield*, 10 *Ohio* 156, among other rulings of the court, we find this, speaking of taxing before patent issues, that *if the right to tax exists*, AND THAT IT DOES, THERE HAS NOT BEEN ANY SERIOUS QUESTION FOR MANY YEARS, AT LEAST, *it would seem to follow that the right to collect must also exist.* See also, *Blackwell* 482-3; 575-6, *and note*; *Ib.* 633.

The true test is the *selling* of the land by the Government—and not the patenting it. In *Dixon vs. Doe*, 23*d Miss.* (1 *Cushman*) 84, the court held, lands not *sold* by the Government were not subject to taxation. This is true beyond all question. And then follows, of course, the other proposition, that if *sold* by the Government, lands can be taxed. In the case at bar, the money was paid, certificate given, and in fact an entry was made—then the lands were sold by the Government, and, at once, they were liable to be taxed.

We claim our position sustained by law, reason and good sense. Although the question has not been determined by the courts of many States, yet from the perfect unanimity in all the courts in their adjudications, as to what rights enure under a certificate, and also of the courts which have decided the question of taxing before patent issues, (and there is not one against taxation before patent,) we do insist, the land in controversy, in this suit, was liable to taxation when assessed and sold by the sheriff of Clark county.

Here we will call attention to one thing more touching this point. By granting the patent, according to the doctrine of relation, the entry of Harrell's heirs, and their title thereunder, were

confirmed—it simply said the land belonged to them in 1830—the patent related back and "*filled up all gaps*," cured all defects. *Carroll vs. Safford, sup.;* 15 *Ohio*, 367; 7 *Ohio*, 156. This doctrine of relation as to patents, will not be disputed at this day. If it should, however, in this case it would matter not, for the Denton entry would be admitted as good, as his and the Harrell heirs' claims were in conflict before the Department. Then, if Denton's entry be good and valid, of course Hardy's representatives can get nothing, as he bought the interest of Harrell's heirs. In the case cited from 15th Ohio, it was laid down that: *if the original owner (holder of certificate,) received a patent after the sale for taxes, he will be treated as a trustee for the purchaser at the tax sale;* and so in the case from 7 *Ohio*, it was said, that: *where lands are sold for taxes before patented, and patent afterwards issues, the patentee holds subject to the claim the purchaser may have in consequence of such tax sale.* So, in this view of the case, the patentees, or those claiming under them, hold this land merely as trustees for Duncan and Flanagin, purchasers at the tax sale.

The case might be left here so far as we are concerned, and we will not do more now, than call the attention of the court to some of our statutory provisions on the subject of tax titles, limitations, &c.

In the first place, the tax sale was in 1842, and appellants do not show that their grantors were seized or possessed of the land ten years next before the commencement of this suit, which was March 20th, 1856, and for this reason they are barred; *Arkansas (Gould's) Digest, p.* 748, *sec.* 1; and they do not show such disabilities as are named in the *same act.*

Nor was the suit brought within five years after the tax sale; *same act*, allowing minors three years after disability removed. Elizabeth Harrell married in 1839, and died August, 1845, 24 years of age. November, 1842, William Harrell was 19 years of age. Isham Harrell died in 1849, aged 24 years. These are the heirs of Harrell, and it is plain this section of the limitation act cuts them off, as well as persons claiming under them.

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Hardy having purchased the interest of the heirs, and his last deed, dated July, 1854, prevents him from contesting the decree of confirmation of Duncan and Flanagin. The act gives minors the right to appear within one year after their disability is removed, which they did not do; nor did Hardy, claiming under them, for a period of nearly two years passes by, before he commences his suit, and hence the decree of confirmation becomes final and conclusive under that section.

More than one year passed after sale before the sheriff made a deed to Duncan and Flanagin, and the land was not redeemed, by which means the deed became evidence of the regularity of the sale, and vested in Duncan and Flanagin a title to this land. *Sections* 111 *and* 112, *pp*, 948-9, *Ark. Dig.; and section* 129, *p.* 951, *Digest*, allows only one year to redeem. These sections are sweeping—make no exceptions or reservations, and where the Legislature makes no exceptions, the courts cannot. 1 *Eng.* 14; 13 *Ark.* 291; *Pryor et al. vs. Ryburn*, 16 *Ark.* 671.

There is no *actual* possession and cultivation of the land in controversy, but having a deed recorded, is such color of title as will constitute adverse possession on the part of those having such deed, to let in the defence of limitation. *Pillow vs. Roberts*, 13 *How.* 472; 7 *Eng.* 822; *Howard vs. Howard*, 17 *Barb. Sup. Ct. Rep.* 663.

And under the laws of Arkansas, the fact of possession by the purchaser is immaterial so far as the question of limitation is concerned; *Mitchel & Wife et al. vs. Etter et al.*, 22 *Ark.* 178.

And it is no difference if the lands belong to minors; *Smith vs. Macon*, 20 *Ark.* 17.

The reasoning of the Supreme Court of Arkansas, in its decision of this case, (21 *Ark.* 240,) is so convincing it is argument enough to refer this court to that decision. The defendants are willing to rest their case on that adjudication.

In conclusion, therefore, defendants claim, whether defending on the merits of the case, or under the Statute of Limitations, they show a clear, good and legal title to the land, against plain-

tiffs, and feel assured that the court will agree with them after looking into the case, and affirm the decree of the court below.

Respectfully submitted.

~~A. H. GARLAND~~,
Counsel for Defendants.

R. Johnson
of Counsel

IN THE

Supreme Court of the United States.

December Term, 1866.

Witherspoon Executor of Hardy, Plaintiff in Error vs. Duncan and Flanagin, Defendants in Error.

WRIT OF ERROR FROM THE SUPREME COURT OF THE STATE OF ARKANSAS,

Argument for the Plaintiff in Error.

PRINTED BY JAMES D. BUTLER, LITTLE ROCK, ARKANSAS.

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In the Supreme Court of Arkansas,

July Term, 1857.

Witherspoon Executor of Hardy Appellant, vs. Duncan and Flanagin, Appellees.

APPEAL FROM CLARK CIRCUIT COURT—IN CHANCERY.

ARGUMENT FOR APPELLANT:

The bill in this case, was brought by Hardy, in his lifetime, to September term, 1855, of the Clark Circuit Court, against the defendants, Duncan and Flanagin, for the recovery of two quarter sections of land, and to have the title quieted, as to an adverse claim set up by them to the land.

The case presented for the consideration of this court, may be understood from the following state of facts, gathered from the pleadings, exhibits, and agreement of record:

Timothy Harrell being a settler in that portion of the Territory West of Arkansas, which was ceded to the Cherokee Nation of Indians, by the treaty of the 23d of May, 1828, and entitled to the benefits of the Act of Congress of May 24th, 1828, the eighth section of which provided for making donations to settlers who had removed from the ceded territory, and having departed this life, his heirs at law, on or about the 17th day of May, 1830, adduced proof of his claim to such donation, before the Register and Receiver of the Land Office at Little Rock, who being satisfied with the testimony adduced, of such actual settlement and subsequent removal, allowed their claim to a donation of 320 acres of land, pursuant to the provisions of the act. Whereupon

the heirs applied to the Register to enter the two quarter sections of land now in controversy, (at that time included within the Little Rock Land District,) in satisfaction of their right to such donation, which entry was allowed by the Register on the 22d of May, 1830, and a certificate thereof in due form, transmitted by him to Washington City, where the Commissioner of the General Land Office, by authority of law, and the usage of his Department, and under instructions from the Secretary of the Treasury, suspended the claim, and for some supposed defect in, or objection it, refused to confirm the decision of the District Land Officers, or to sanction such entry, or to cause to be issued any patent for the land applied for, until the 5th of February, 1846, when the claim was finally confirmed, and a patent of that date regularly issued by the President, granting the land in question to the heirs of Timothy Harrell, in virtue of such right to a donation. The complainant, Hardy, subsequently acquired by purchase, at administration sale, and also under a decree for partition, and owned at the time of his death, the respective interests of the heirs of Harrell in the land, and which, by his will, was vested in his executor.

These two quarter sections, among other tracts of land, were entered and purchased from the United States on the 8th of June, 1836, at the United States Land Office, at Washington, (within which District the same were then included,) by Gabriel W. Denton. The sale to Denton was, to all appearance, regularly made, in accordance with the forms prescribed by law, and the instructions to the District Land Officers; and he received the usual receipt or certificate of payment, from the Receiver of the Washington Land Office, and the Register issued, and transmitted to Washington City, the patent certificate, usual in such cases, upon which a patent would issue to Denton. The entry of Denton, and the sale to him was, for aught that is known to the contrary, made and permitted in good faith, through mistake and in ignorance of the fact that a part of the same land had been applied for by the heirs of Harrell, to be entered and taken in satisfaction of their donation claim.

After the entry of Denton, and in or previous to the year 1842, the Auditor of Public Accounts of this State, in accordance with the statutes enjoining such duty upon him, procured from the Register of the Land Office at Washington, an abstract of lands entered and sold at that office; and, therefore, subject or deemed to be subject to taxation under the State laws, which abstract, included by number and description, the lands sold to Denton, and a descriptive list of all such lands was furnished by the Auditor, in or previous to the year 1842, to the sheriff and ex-officio assessor and collector of taxes for the county of Clark, (in which the two quarter sections of land in controversy are situate,) and they were accordingly listed and assessed to, and in the name of, Gabriel S. Denton, for taxation, for the year 1842. The lands in controversy were not listed or assessed for taxation in or for that year, by or in the name of any other person, in any other manner, or by any other means, than as before stated, and because the same were supposed to have become subject to taxation, as the property of Denton, by reason of his purchase of the same from the United States, at the Washington Land Office.

On the 7th of November, 1842, the sheriff and collector of Clark county sold these lands for the taxes of that year, to the defendants; and, on the 15th of January, 1847, the then sheriff of Clark county, executed to them his deed of conveyance for the same, with various other tracts of land, reciting as to these tracts, that they had been patented to Gabriel W. Denton, and listed and assessed to him for taxes in 1842, which remaining unpaid, they had been advertised and sold on the 7th of November, of that year, &c. It was agreed, that no exception should be taken to the regularity or formality of the proceedings attending the sale, or conveyance for taxes.

At the September term, 1847, of the Clark Circuit Court, the now defendants, Duncan and Flanagin, under the statute for that purpose, exhibited their petition against Denton, praying a confirmation of their tax title—and, at the March term, 1848, a decree was passed, purporting to confirm such tax sale, and to vest

in the petitioners, all the title and claim of said Denton, as well as of all other persons to the land in question.

As a consequence of the decision of the Commissioner of the General Land Office, in February, 1846, to confirm and allow the claim of Harrell to a donation, and of which proof had been made by his heirs before the District Land Officers, at Little Rock, and to allow and sanction the entry applied to be made by them in satisfaction of such claim, and to cause a patent to be issued to them for the 320 acres of land in question: the Commissioner also decided to and did set aside and cancel the entry made by Denton, and the certificate issued to him, so far as it conflicted with the location confirmed to the heirs of Harrell, as having been illegally and improvidently permitted, whereby no title was ever acquired; and, in the month of February, 1849, the United States caused to be refunded and paid to Denton, the purchase money paid in by him therefor, at the time of his entry. The land in controversy is wild land, of which no person has ever been in actual possession.

Certain facts, also, were agreed on, respecting the alleged nonage and disabilities of the heirs of Harrell; but, according to the view we take of the case, they are immaterial, and are therefore not here stated.

We concede that, in accordance with the decision of this court in *Merrick & Fenno vs. Hutt*, 15 *Ark.* 331, a sale for taxes is not vitiated by the assessment of the property to, or in the name of one, who is not the owner; as it is there held to be the duty of the owner to look after the payment of the taxes chargeable by law on his land, and for the reason that the State is not to be deprived of her revenue, or the confidence of purchasers weakened, and the security of titles shaken by any inability of the assessor or sheriff to perform the impossible duty of ascertaining or deciding upon the ownership of all the various lands within his district. The correctness of that decision, as to this proposition involved in it, we do not undertake to controvert.

And we are bound to concede the law to be, that when land has been sold by the United States, entered and paid for by the

purchaser, who receives the usual certificate, or receipt, for the purchase money, and in whose favor the usual patent certificate issues, (see the formula stated in *Carroll vs. Safford*, 3 *Howard U. S.* 441,) it becomes the property of the purchaser; of which he is entitled to the possession, subject to sale or incumbrance by him, and to sale under execution against him; is devisable or descendable to his heirs; and that it becomes subject to taxation as his property. The title acquired by the purchaser is analagous to a sale and conveyance by bond or covenant for title to land, of which the vendee is the owner, but has not obtained the legal title, or as in case of sales by the United States, the issuance of the patent, as the consummation of the legal title, is inconvenient or impracticable, at the time of the sale. The patent is regarded as the evidence of the legal title, which, when it emanates, has relation to the inception of the title; that is to say, the time of entry or purchase. The United States, as the vendor, has parted with all her right to the land, and her officers cannot lawfully withhold or refuse the patent, and have no power to sell the land again—and, if that should be done, the patentee would become a trustee of the legal title for the first purchaser or rightful owner. The exercise of the taxing power by the States, over land so acquired from the United States, is no infringment of any reserved rights in the General Government, who has in reality, and for all beneficial purposes, ceased to be the owner of it, or to have any lawful control over it.

Such is the general doctrine of the principal case, of *Carroll vs. Safford*, just referred to, and it would hardly be possible for us to state it more broadly, or in terms more favorable for the appellees in this case, than we have endeavored to do.

Of *Carroll vs. Safford*, it is to be observed, that it was an ordinary cash entry, and the usual certificates were issued to Carroll, the purchaser, from the Register and Receiver, who acted in the discharge of their duty, and within the scope of their authority. The sale was made and consummated, so far as it could be done by the United States, and in due course of official routine, the patent issued to Carroll, who never pretended that there was

any circumstance to vitiate his entry, or give to the officers of the United States, charged with the supervision of the Land Department, and the issuance of patents, any color of authority to cancel it, or excuse for withholding the patent; and, indeed, such an allegation or pretence there would have been fatal to the complainant's case, which proceeded upon the ground that he was the owner of the land, by purchase from the United States; and the sole cause of the complaint was, that after his purchase, and before the final emanation of the patent, the State authorities of Michigan, had assessed it to him for taxation, and had sold it for taxes; and unless restrained, the collector would proceed to execute a deed to the purchaser. The Supreme Court held, that for aught that appeared, and according to the case made for complainant, the mere naked fee of the land remained in the United States, and there was no imposition of a tax on the property of the United States.

In order to make the case, now under consideration, analogous to that of *Carroll vs. Safford*, not only must the patent have issued to Denton, in pursuance of his entry, but *he* should be himself the party upon the record, contesting the validity of the tax, upon his own land.

The counsel for defendant, in *Carroll vs. Safford*, admitted that if from accident or the exceptions which he had before adverted to, the certificate of purchase should not be matured into a patent, "the purchaser, at tax sale, could not acquire a better title than the holder of the certificate." That is his risk. But, he adds, "in the case of the present complainant it is not pretended that his titles were not perfected. On the contrary, the record brought up here, alleges and admits that the patents for his lands were issued before the lands were sold for taxes."

And the court, in its opinion in that case, said: "But it is supposed that because, on some certificates patents may not be issued, taxation of unpatented land is an interference "with the primary disposition of the land." And it is said that in the case of *Ostrom vs. The Auditor of Michigan*, before the Circuit Court in 1842, out of one hundred certificates, patents were refused on

fourteen of them; that these lands had been sold for taxes under the statutes of Michigan; and that the United States either retain these lands or have conveyed them to third parties.' The court then proceed to say, "Michigan does not warrant the title to land sold for taxes. The deed by the express words of the statute, when duly executed and recorded, may be given in evidence in the same manner, and with like effect, as a deed regularly acknowledged by the grantor,' &c. The Government has no right to refuse a patent to a *bona fide* purchaser of land offered for sale. But, where there has been fraud or mistake, the patent may be withheld, *and every purchaser at a tax sale incurs a risk as to the validity of the title he purchases.* He incurs the same risk after the emanation of the patent. But how this interferes with 'the primary disposition of the public lands' by the United States, is not perceived. The sale for taxes is made on the presumption, that the purchase from the Government has been *bona fide*, and if not so made, *the purchaser at the tax sale acquires no title;* and, consequently, no embarrassment can arise in the future disposition of the same land by the Government."

The elaborate argument of Attorney General NELSON, in that case, demonstrates not only the importance of the question there presented, but the serious doubts attending it. It was a new question then for the first time authoritatively settled. Admitting the full force of the decision, it establishes all that we need contend for in this case, which is:

1*st.* That although the point decided in *Merrick & Fenno vs. Hutt*, that it makes no difference in whose name the land is taxed, is correct, *as a general principle*, and applicable to the case before it, and to all cases where the title to the land had passed out of the General Government, it is qualified by the compact between Arkansas and the United States, and does not apply in all its scope, to lands sold by the United States, but not patented, *and on which the patent may never issue;* because, in such case, it does make a difference—so, that if the United States continues to be, or some other grantee of hers, becomes the owner of the land, by an independent purchase, which is ripened into a patent,

the tax sale would be inoperative, and pass no title whatever. Nothing can be clearer, than that the United States must have the right to grant the fee by her patent when issued; and any interference with that right by State legislation, or action under it having that effect, though not designed by the State law, would be an infraction of the compact. If the United States can be deprived of the power to sell or grant land, because at one time sold erroneously or without authority, the ordinance and compact is of no efficacy, and the evidence of title issued to the patentee is a mockery.

2*d*. That although the general principle may be, that a sale for taxes is a proceeding *in rem*, operating upon and passing the whole title, without reference to the particular title or estate of the person to whom, or in whose name it was assessed, (whose title may be bad or doubtful, or who, as it may be, has only an estate for life, or for years,) and that it is the land which is taxed, and not the particular estate of the tenant, so that the entire fee, the interest of all the world, passes by a paramount sale for taxes: still, in the case of land sold by the United States officers, and assessed to the purchaser, the interest or right only, whatever it may be, of that purchaser from the United States, is sold or passed by the tax sale, which as the court says in *Carroll vs. Safford*, "*Cannot convey a better title to the land, sold for taxes, than the owner of such land, to whom it stands charged, possessed at the time the taxes constituted a lien, or when the land was sold.*" The court there had difficulty, and intimated no opinion as to the nature of the title acquired by the purchaser at the tax sale in such case, where the title of the supposed owner by purchase from the United States, was only inchoate or equitable. But we may concede that he gets all the interest of that owner; and, to that extent, the sale is not inoperative; and perhaps if that purchase is confirmed and ripened into a patent, it might relate back to the entry, and the intermediate sale for taxes would be valid, as against the patentee, and all claiming under him, so as to estop him from asserting any right to the land under the patent. The purchaser, as we have seen, takes the risk of that inchoate or

equitable title becoming perfected by patent. And if the patent issues on that entry, or to an assignee of the original purchaser, or to any one in privity with him, the same reasoning might apply, and the tax sale would be upheld. But that is not the case here. The entry of Denton was set aside, as to the two quarter sections of land in controversy, and the purchase money refunded to him, long after the alleged sale of the land, which had been assessed to him for taxes, as his property, and solely upon the ground of his supposed and void purchase of it from the United States; and the patent issued to another person, upon a claim wholly different from that of Denton, and having no connection with it.

The case of *Astrom vs. Hammond, Auditor*, 3 *McLean* 108, (decided in 1842,) was also a bill brought by the owner of the land, who had entered it with cash at the United States Land Office, to restrain the collection of taxes assessed to him upon it, after his entry and before the emanation of the patent, which had been delayed in consequence of the press of business at the General Land Office. It seems that the Michigan statute of 1836, (similar to that of Arkansas,) made it the duty of the assessors to examine the Land Offices of the United States, to ascertain what lands had been entered, and which were to be sent down for taxation. Judge McLean held, that land so purchased and paid for, and where the vendee had received the usual certificate of purchase, upon which a patent would issue, and which the United States could no more disregard, than they could disregard a patent, was property, whether considered as held by an equitable or by a legal title, and was subject to taxation. To that extent, the decision is authority; it neither professes to, nor does the reasoning of it, go any further, than the state of case there presented.

Carroll vs. Perry, 4 *McLean*, 26, was in all respects like the case of *Astrom vs. Hammond, Auditor, &c.*, and the decision of Judge McLean, is but a reiteration of the opinion he had expressed in the previous case.

Gwyne vs. Nicewinder, 20 *Ohio Rep.* 556, is a somewhat interesting case, and contains a review of some of the previous

decisions of the same court on this subject. It was a bill brought by a purchaser at tax sale, who had received the collectors deed, against the patentee, who was the assignee of the original purchaser, who had made an entry and recorded survey of the land, which was afterwards and before the final issuance of the patent, regularly sold for taxes; and the object of the bill was to compel the patentee to convey the naked legal title which he held, to the complainant, who held the tax title. The controversy was, to all intents and purposes, between the purchaser at tax sale, and the original purchaser of the land, to whose assignee the patent had issued. It appears that the controversy between the same parties had been twice before that court. First in 13 *Ohio Rep.* 74, where it was decided that the legal title of the patentee was not affected by the tax sale, and he was consequently entitled to recover or defend the ejectment. And again, in 15 *Ohio* 367, where upon demurrer to a bill, brought by the purchaser at tax sale, the court held that his remedy was properly in chancery. But a rehearing having been obtained, the same court held in 20 *Ohio Rep.*, that if the tax sale was irregular, the complainant could not, for that reason, be entitled to any relief; and, if on the other hand the tax sale was regular and valid, he had a complete remedy at law—and, therefore, did not need the aid of a court of equity. Thus overruling the earlier decisions in Ohio, cited in the dissenting opinion of Judge HITCHCOCK, and which had leaned to the conclusion that the purchaser of land at tax sale, before the issuance of the patent, acquired no legal title which he could successfully assert against the patent. But then, after the decisions made by Judge MCLEAN, on similar questions, the majority of the court, sided with him, and their opinion is but an elaboration of the one pronounced by him in *Anstrom vs. Hammond*. The argument of the court (*on page* 562,) is, substantially, that the party entering the land had made complete and perfect payment for it. It belonged to him, and not to the United States; and, therefore, the assessment of a tax on it, as his property, was no infringemnt on the sovereignty of the General Government; but rather carrying out its intentions by recog-

nizing its vendee as the owner of the land. The court proceeded to say: (and we want no better argument in support of our position,) "Now, if it could be held that the General Government by thus holding the mere naked legal title, had such a right that the State was precluded from disposing of the legal title, for taxes, as *against the owner*, the same theory would prohibit the State from taxing the land. The States have no more power to tax the lands of the United States, than they have to make a title for them. The one would be an equal attack on the rights of the General Government with the other. We think the proposition proves too much for the complainants cause; *it would prove the tax unwarranted, and all the proceedings under it void. It is to be observed, that this in not a controversy where any right is or can be set up, on the part of the General Government;* it is solely between individuals. The State would have a clear right to make [as it had done, by the tax title statutes,] as between individuals, the equitable title of the purchaser, at tax sale, a legal one, and treat it as such."

The opinion applied to the case at bar, shows that the validity of the assessment of this land to Denton, and the sale of it for taxes, depended upon his being the owner of the land; and unless the patent issued to him in consummation of his entry, no title vested in the purchaser at tax sale. We have seen that no patent issued to Denton, but that his entry was cancelled, *and he received back the purchase money which he had paid into the Land Office.* It also establishes the proposition, that if, at the time of the assessment or sale for taxes, any right or power of disposal of the same land, remained in the General Government, the tax was unwarranted, and all proceedings under it void. The record in this case shows that the United States did afterwards make a disposition of the land, adjudging the right, and awarding the patent for it to other persons, and upon a claim wholly distinct from, and hostile to, that of Denton.

The court in *Gwyne vs. Nicewinder*, also sustain, as we think, a proposition for which we contend in this case. The court say: "We are of opinion, that much of the difficulty in this case arises

from attempting to make a tax title analogous to an ordinary chain of title. A tax title, from its very nature, has nothing to do with the previous chain of title, and does not in any way connect itself with it. It is a breaking up of all previous titles. The party holding such title, in proving it ,goes no further than his tax deed; the former title can be of no service to him, nor can it prejudice him." As between individuals, the court say the title is an entire thing, and "In case the person in whose name it was listed, who had but an equitable title to the land, at the time of the tax sale, gets a conveyance from the person holding the legal title, he cannot avail himself of it. The land has gone; another title has intervened. Just so with a person holding under a purchase from the Government. Until the patent issues, he can hold nothing but an equitable right, because he cannot trace his title to an original source; but, if the land be sold for taxes, whilst his right is a mere equitable one, *he* cannot reclaim it, though he afterwards obtain a patent from the United States."

Thus arguing, that a tax sale, as among individuals, and where the paramount title is out of the Government, operates upon the land, and passes the whole title, inverting as to tax titles, the common law maxim, by giving effect to the last deed. And that where the legal title has not passed out of the Government, the same principle may apply, by relation of the title, *provided* the patent does afterwards issue to the purchaser upon whose equitable interest in the land the tax had been levied. The court, in straining a point to go to that length, tacitly concede, that the tax sale is of no validity or binding force whatever, as against another claimant of the same land, who afterwards succeeds in getting his claim recognized and patented. The proposition as before stated, is that where land has been sold by the United States, and is assessed to the purchaser for taxes, and sold before the issuance of the patent, the tax sale, can operate as a proceeding *in rem*, only to the extent of the equitable interest of the supposed owner, which, in the case of Denton, proved to be none whatever.

The same principle is distinctly asserted by the Supreme Court

of Alabama, in the case of *Dyer vs. The Br. Bank at Mobile*, 14 *Ala.* 622, which was an action of trespass to try title, where the plaintiff relied on a tax deed to land which had been assessed to a Mrs. Dailey, who was in possession, claiming title. The Bank also claimed title; and by an act of the Alabama Legislature, all the property of the Bank had been exempted from taxation. The court, it may be supposed with reference to the case before it, said: "If the persons in possession in 1842, were liable to pay the tax for that year, *their interest only* could have been sold to enforce its payment; and if the defendant had a paramount title, dating back to a time previous, *its right could not be impaired by the sale.* It is clear, that a purchaser at a sale under judicial process, for the payment of taxes, purchases the interest of the party whose property is sold, and not the independent and superior or ultimate title of a third person. This seems to us to be a proposition so clear, that it need but be mentioned to receive universal concurrence."

Now, the independent or superior title here spoken of, owed its existence to an exercise of sovereignty by the Alabama Legislature, in exempting the property of the Bank from taxation. By that act, all property of the Bank, and all of its interest in any property, to the extent of its title, was withdrawn from among the objects of taxation, as effectually as if such property, or interest in it, belonged to the State in her sovereign capacity; and the right or title to it, thus exempt, could not be impaired by a sale for taxes. And so it is with the ultimate paramount title of the United States, to land sold, where the patent is withheld and finally refused.

It appears, also, to have been held in *Dixon vs. Doe*, 23 *Missi.* 84, (a case we have not seen) that so long as the legal title remains in the United States, the land is not liable to taxation, and no title passes to the purchaser.

But if, as held in *Erwin vs. The Bank of the United States*, 1 *Barr.* 349, and *Willard vs. Blunt*, 11 *Iredell* 624, and intimated in *Finch vs. Brown*, 3 *Gilman* 488, the purchaser at tax sale only gets the interest or estate of the person to whom the taxes

are assessed, then it is clear, that in this case the appellees could under any circumstances have acquired only the interest of Denton, and their tax title become wholly inoperative when that interest was extinguished in 1846.

The only plausible ground that can be relied on to support the tax title in this case is, not that Denton had any vestige of title, but that the heirs of Harrell, the donation claimant, had an inchoate equitable title, by means of the proof and allowance of their claim before the District Land Officers, in 1830, and their application to locate these two quarter sections of land in satisfaction of such claim to a donation; and that when the claim was finally confirmed by the General Land Office, and the patent issued to them in 1846, it had relation to their application in 1830, which appropriated this land, and was the cause of Denton's entry being set aside; that from 1830, this land belonged to them, and it was their duty to have paid any taxes assessed on it, and though not assessed to them, or listed in their names, the sale was conclusive on them, and passed their interest in, or claim to, the land, in accordance with the decision of this court in *Merrick & Fenno vs. Hutt.* Again we have stated the proposition broadly and fairly for the appellees.

Now it is a familiar principle, that the doctrine of relation may be invoked to uphold a title—to sustain a senior equity as against a junior legal title; but it is a novel idea, that it can be used as a weapon of offense to defeat an incipient title, and a harsh application of it, to bolster up an unconscionable tax title upon the downfall of an acknowledged equity. Moreover, the very object the *compact* had in view, was to do away with the doctrine of relation, so far as the operation of it would be *to defeat* titles which might emanate from the General Government.

We have endeavored to show, upon reason and authority, that the decision of this court, in *Merrick & Fenno vs. Hutt*, does not, and upon the facts of that case was not intended to apply to lands, the title and control of which remained in the General Government; and that in regard to such lands, nothing can pass by a sale for taxes, except the interest or right, whatever that

might be, of the person to whom they were assessed. There are some further considerations to be noticed, and which we think will be conclusive on this point.

We have seen, that when this land was assessed and sold for taxes in the year 1842, it was not in fact assessed or taxed to the heirs of Harrell; and we maintain that, by law, it was not then subject to taxation, as their property, so that there is no possible application for the decision in *Merrick & Fenno vs. Hutt.*

By the act for the admission of Arkansas into the Union, the articles of compact, and the ordinance of the General Assembly, ratifying the same, in 1836, the State of Arkansas bound herself in the most solemn manner, never to interfere with the primary disposal of the soil within her boundaries, by the United States, nor with any regulations Congress might find necessary for securing the title in such soil, to the *bona fide* purchasers thereof, and that no tax should be imposed on lands the property of the United States.

The Supreme Court of the United States, in *Carroll vs. Safford*, never supposed they were shaking, much less overturning, the cases of *Stringer vs. Young*, 3 *Peters* 320; *Boardman vs. Reed*, 6 *ib.* 328; *Bagnell vs. Broderick*, 13 *Peters* 436; *Wilcox vs. Jackson*, *ib.* 498; *Brush vs. Ware*, 5 *Peters* 93. and *Stoddard vs. Chambers*, 2 *Howard* 284; to say nothing of the earlier cases, all deciding or predicated on the proposition that Congress having power to dispose of the Public Domain, and to enact all laws and needful regulations respecting the sale thereof, where it has, by its legislation, provided for the issuance of patents, they are necessary to complete the title; and, until the patent issues, the fee remains in the United States, and the legal title has not passed. If this be not so, with the same propriety it could be contended that the verdict of a jury is sufficient, without any judgment of the court in pursuance of the finding; or that the existence of a judgment could be proved by parol evidence, without an exemplification of the record.

In each of the tax title cases, before cited and commented on, the simple question was, whether land legally sold by an officer

of the United States, became subject under the State laws, to assessment and taxation against the purchaser, of it, as the owner, before the final emanation of the patent. In all of them the entries were made in the usual mode of purchase at private sale, and it was not pretended, that there was any illegality or want of authority in the sales, or that the incipient title had failed. On the contrary, we repeat, the bills to set aside the tax sales were brought by the purchasers themselves, claiming to be the owners of the land by virtue of the patents which had issued upon their own entries. The whole scope of the decisions is that by such entry the land was sold and appropriated according to law; and the purchaser being for all beneficial purposes the owner of the land, it became subject to taxation as his property. The courts concede that every purchaser of such land, incurs the risk as to the validity of the title he purchases; because where there has been fraud or mistake, the patent may be withheld; and even after the emanation of the patent, he incurs the same risk, because the United States may proceed by *scire facias* to have it recalled or cancelled. Clearly, the purchase at tax sale, would fail, unless the particular title should afterwards be consummated by patent. *Carroll vs. Safford*, though treating of a broad and general question, is careful not to omit this reservation. The court say: "It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake."

Until the issuance of the patent, the paramount title in all cases remains in the Government; and until then all State legislation is subordinate to the primary right of soil and disposition remaining in the Federal Government, and does not profess to interfere with it, *Brock vs. Smith*, 14 *Ark.* 434, citing *Pelham vs. Wilson*, 14 *Ark.* 289; *Hughes vs. Sloan*, 3 *Eng.* 146; *Pelham vs Floyd*, 4 *ib.* 530, and *McFarland vs. Mathis*, 5 *ib.* 560; and contingent upon the issuance or withholding of the patent—in regard to which the President, and the officers of the Land Department acting under him, have a discretion.

According to the assumption contended for by the appellees, based on the supposed authority of *Carroll vs. Safford*, if the entry and sale allowed or made by the District Land Officers to Denton passed the title, and divested the Land Department of the power to make any subsequent and different disposition of the land, and deprived them of all jurisdiction over the subject, the effect would be to deny to the President and his subordinates any salutory power of revision, or of withholding the patent; and the title would pass in all cases, by the act of the District Land Officers, in making a sale or permitting an entry, no matter how erroneous, or prejudicial to the rights of the United States. That the Commissioner of the General Land Office, did have and rightfully exercise such discretion in cancelling the entry of Denton, and causing the purchase money paid by him to be refunded is not questioned by the appellees; *and all we have to contend for, is, that a like controlling discretion existed in regard to the donation claim of the heirs of Harrell.*

From the necessity of the case, and the uniform usage, and construction of the law, making the President the head of the Land Department, and requiring him to see the laws faithfully executed, he acting through his subordinates, there has grown up a right of appeal to, and power of revision in, the Commissioner of the General Land Office, over the acts and decisions of the District Land Officers. The proceeding by *scire facias*, to cancel patents, was found to be an inadequate remedy for the various omissions and commissions, and errors of judgment, of such a numerous class of officers. The power to suspend or withhold the patent in doubtful cases, has never been questioned. Over that the District Land Officers have no control or jurisdiction. Mr. Butler, in his opinion, 2 *Ins. and Opinions, p.* 85, said: "though the Register and Receiver are made by law the exclusive judges of the sufficiency of the proofs, on all claims to pre-emption, under the act in question, it does not therefore follow, that letters patent are in all cases to be issued by the General Land Office, on the certificates of purchase granted by them. No doubt it would

have been competent for Congress to have annexed such a consequence to that certificate," &c.

No doubt a discrimination is to be made between the appropriate functions of the Land Officers, in deciding upon the proofs submitted to them in pre-emption cases and the like, and the duty and discretion imposed by law upon the President, to issue the patent to the person entitled to it. But though it be a duty, the patent is not a mere matter of form, which the President will issue with indifference to one or the other, where there are opposing claimants.

Even as to matters within the exclusive jurisdiction of the Land Officers, it is well known, that in making their final decisions, they often and indeed usually yield, to the advisory opinion of the Commissioner. More especially is this so in pre-emption cases, (see opinion of Mr. BUTLER, before quoted, and the order of the President, 2 *Ins. and Opinions, No.* 60, *p.* 92,) and in all analogous cases, like that of a claim preferred to a Lovely donation, where the District Land Officers are empowered to hear, and pass upon the sufficiency of the proofs. In *Dickerson vs. Brown*, 9 *Sm. & Marsh.* 136, the court use the following language: "But admitting that it constituted a legal title, it was in proof that the certificate of entry had been cancelled, and we cannot say that the Register and Receiver, with the approbation of the Commissioner of the General Land Office had no power to cancel it. On the contrary, it is believed that such power is uniformly exercised. To a certain extent, those officers have a discretion in such matters. They are empowered to hear and decide on a pre-emption right. As against the Government the certificate is but an incipient or inchoate title; the officers discovered that it had been improvidently issued, and cancelled it, and issued a complete title to another, and refunded, or offered to refund the money paid." See, also, *Lewis vs. Lewis*, 9 *Missouri* 183; *Miller vs. Ker*, 7 *Wheat.* 1. In *Lott vs. Proudhome*, 3 *Robinson La.* 295, the court say: "It does not appear that these patents have ever been vacated or annulled, nor are we acquainted with any law which authorizes the Commissioner to vacate a patent

already issued. We repeat, however, what was said in the case of *Guidey vs. Woods*, 19 *La. Rep.* 334, that we do not doubt the authority of the Commissioner of the General Land Office to declare void a certificate of purchase of lands, which the law forbids to be sold or disposed of." See, also, *Gaines vs. Hale*, 14 *Ark.* 21, recognizing an advisory power in the heads of the Land Department, over its inferior officers, and where an entry, directed by the Commissioner of the General Land Office to be permitted, was sustained, for the reason that it involved the exercise of a sound discretion on the part of that officer; and *Wynn vs. Garland, ib.* 460, where this court said "we have no doubt of the regularity and validity of this action of the Land Department in annulling Wynn's entry. It was consistent with the uniform usage of the Government, and is to be gathered from the orders of the President, the opinions of the Attorneys General of the United States, the instructions of the Commissioner of the General Land Office, and the Act of Congress providing for the refunding of the purchase money, when entries are set aside. Besides, the power is expressly recognized in several judicial decisions."

The court will perceive by reference to the volume of Instructions and Opinions before cited, that the class of claims known as Lovely donations, were peculiarly the subject of watchful care and jealousy on the part of the officers of the Land Department at Washington. The District Land Officers were instructed by the commissioner of the General Land Office, to scrutinize the proofs closely, so as to guard against frauds upon the government. They were required to enclose the evidence, with their opinion endorsed as to its sufficiency, to the Commissioner of the General Land Office at Washington, for his approval. The claim itself if allowed, was merely a *chose in action*, being a privilege of locating a certain quantity of land, but not, until located, a right to any particular tract of the public domain. *Mulhollan vs. Thompson*, 13 *Ark.* 232. If, in the opinion of the District Land Officers, the proof was sufficient, it was usual for the claimant, whenever he desired to locate it, to make application to

them, specifying the land applied for in satisfaction of the claim; but so far as we have been able to ascertain, it was not usual nor contemplated either by the Act of Congress or instructions, to issue any patent certificate, or other evidence of title to the claimant; but it was transmitted with the papers relating to the claim, to the Commissioner of the General Land Office, for confirmation or rejection. In some instances they were wholly disallowed; in others the papers were remanded to the District Land Officers, with instructions to permit additional proof to be adduced. In many instances, these claims remained suspended, at the General Land Office, for many years, neither confirmed nor rejected. It may be stated as part of the public history of the country, that about the year 1838, Mr. Gilchrist, under appointment from the General Land Office, came out to Arkansas, as special Commissioner, to investigate and report the character of these donation claims. See 2 *Ins. and Opinions, page* 423, *No.* 349; *page* 415, *No.* 352; *page* 421, *No.* 360; *page* 464, *No.* 392; *page* 476, *No.* 402, *page* 480; *No.* 409; *page* 527; *page* 1,010, *No.* 999.

Now we think we have not quoted authority in vain, to satisfy the court, that the heirs of Harrell never had any clear ascertained right to the land in controversy, until the final decision of the Commissioner of the General Land Office in 1846, confirming their donation claim, and the issuance of the patent to them for the lands applied for. Until then the whole subject remained under the control of the Land Department. If rejected, the entry of Denton would have held the land, and he would have received the patent. True, the donation claim was not finally rejected, but there was a continuing power to reject it. The claim did not become consummated, until by the exercise of that power the jurisdiction of the Land Officers over the subject, had become exhausted.

The opinion in *Carroll vs. Safford*, proceeds upon the ground, that there is no lawful authority in any officer of the Government, to vacate a patent certificate upon a cash entry, made in accordance with law, and that it would be an abuse of power to

do so; that the certificate imports an actual present sale of the land, and is as binding on the Government as a patent; and *therefore* the land becomes subject to be assessed *to the owner of it*, for State taxes. How is it possible for this reasoning to condemn to spoiliation the lands applied for by the heirs of Harrell in 1830, in satisfaction of their claim to a donation—when there was no actual sale for a valuable consideration paid to the United States, and they had received no final certificate or evidence of purchase; when they had no right, as against the Government, to possess and enjoy the land, and no right to maintain ejectment for it, within the purview of the State statute, authorizing the action to be maintained upon equitable titles; when the President and his subordinates in the Land Department, had not ceased to have a lawful control over the subject of the claim, but had a continuing power to disallow and reject it?

Admitting the authority of *Carroll vs. Safford*, that upon an ordinary cash entry, the land becomes liable to taxation to the purchaser, it is utterly inconsistent with the idea, that the heirs of Harrell were liable for taxes on the same lands, or bound to list them for taxation; or, in legal phrase, to look [illegible]ment of taxes on their land, under penalty of hav[illegible]t ted to the State Treasury. During all those yea[illegible]d 1846, while their claim lay unacted upon, there st[illegible]n them upon the records of the Land Office, a recognized cash entry of this land by Denton, having the Receivers receipt, armed with the patent certificate, which he was entitled to have delivered to him; and all the consequent rights which it conferred upon him, and to whom, as the owner of the land, the United States, by her lawfully constituted officers, in the exercise of their public duties, had, to all appearance, transferred her title; and a title in him, which for the time being, the General Government recognized, and one which, according to the very theory of taxation adopted by the State, she was bound to recognize, and did recognize, by the act of causing them, by means of the descriptive list of entries procured by the Auditor, from the Register of

the Land Office, to be assessed to Denton, as the owner for taxation.

The revenue act of March 5th, 1838, (*Revised Statutes, page* 673,) imposed a tax on all lands lying within this State, claimed or owned by any person or corporation, whether such lands may have been patented or not, except such as are exempt from taxation by virtue of the compact between this State and the United States. The judicial intendment upon the construction of that statute, is that the General Assembly intended, by its terms, to comply with the ordinance ratifying the articles of compact. No presumption to the contrary can be indulged in. The compact is to be carried out according to its spirit, as well as its letter. That compact does not merely provide that no tax shall be imposed on lands the property of the United States; but the State is bound *never to interfere with the primary disposal of the soil within the same, by the United States*, nor with any regulations Congress may find necessary, *for securing the title in such soil to the bona fide purchasers thereof*. We are dealing with the substance of things, and not with shadows. True, the State does not profess to tax the lands of the United States; she does not profess to interfere with any law of Congress, or regulations in pursuance of law, for securing title in the soil to the rightful owner thereof, deriving title from the United States; but, if this tax title is to be sustained, we venture to say it can only be done by an ingenious sophistry, equal to any *hocus pocus* that ever was contrived. The heirs of Harrell say, we made satisfactory proof of our claim to a donation in right of our ancestor, and applied to enter these lands in satisfaction of it, but our right was denied for many weary years, until at length the United States confirmed our claim, and granted us a valid title to the lands. The purchasers at tax sale, responding, say: we bought the land at tax sale as the property of Denton, who, for ten years, had all the title which the Government could invest him with short of a patent; true, the land was not his, as he confessed, by receiving back the purchase money. The land is indeed rightfully yours, but you ought to have known it, and paid the taxes—though the

United States denied your right and kept you out of possession; though the State of Arkansas, by assessing it to Denton, and we also, by purchasing it at tax sale, supposed it belonged to him. What a blunder you committed in not volunteering to pay these taxes for Denton!

Now, if the Government of the United States had the right to cancel the entry of Denton; if she had the right to confirm the donation claim of the heirs of Harrell, and grant them a patent for the land in 1846, all of which is unquestioned by the pleadings and proofs in this cause—then, and to that extent, the land in controversy, and upon which the State tax was levied in 1842, was the property of the United States. If the Land Officers of the United States had a jurisdiction and supervising control over the subject of this title, then the patent granted in 1846, under the seal of the United States, must have the effect of investing the patentees with a clear title, an unincumbered estate in the land, or else the tax sale in 1842 was a fundamental wrongful interference on the part of the State, with the primary disposal of the land by the United States, and with the lawful regulations prescribed by her for securing title to the rightful owner.

It will not answer to say, that the heirs of Harrell had the best right to the land, because it ultimately prevailed. The admitted paramount sovereignty of the United States over the disposition of her territory, is not to be trifled away by nice distinctions. If the General Government had the right to take the land away from Denton, and give it to the heirs of Harrell, she had such a lawful power of disposal over it, as could not be divested, or in the least degree impaired, by the intermediate sale of it for taxes. The Government had the power to do effectually and completely what she professed to do, as an act of justice so long delayed. The patent would be a fruitless grant, if it can be effectually defeated by a State tax sale, whose only possible merit may be, that it was made in good faith, and without any intention to violate the compact.

It may be contended for the appellees, that the theory of law, is, that if the heirs of Harrell had the superior equity, by the

allowance of their claim by the District Land Officers, upon the proofs adduced, and their application to enter this land in 1830, they had a vested right to the land, which they could assert in a court of equity against any junior patentee, who would become a trustee of the legal title for them. The theory, as far as it has been strained, goes no further; and there is one conclusive answer to any argument predicated upon it. Denton never became a trustee for the heirs of Harrell, because he never had any thing more than the evidences of an equitable title. No patent issued to him, and until it did issue to somebody, no adverse claimant could have had the opportunity of litigating the title, which remained in the United States, by an assertion of their rights in any judicial forum. According to the same theory, the United States would have been a trustee of the legal title for the heirs of Harrell from 1830 to 1846, and we imagine it would hardly be consistent with the honor and dignity of the United States, laying the compact out of view, to suppose that she could be false to her duty and obligation as a trustee, by suffering the land to be sold for taxes, and then grant an empty patent to the *cestues que trust.*

Indeed, some curious questions are attendant on a sale of land for taxes, before the emanation of the patent. Judge McLean did not undertake to decide, what sort of a title the purchaser at tax sale acquired, or how he was to assert it successfully as against the patent subsequently issuing. We left the majority of the court, in *Nicewinder vs. Gwynne*, sweating over the question. If they got out of the difficuly, it was by advancing the novel idea in jurisprudence, that when the patent issued, *it enured to the purchaser at tax sale;* though independent of it; though the tax sale was confessedly without warranty, and having no connection with any previous title; and though the title of the United States, whatever it may have been, was confessedly, in no wise affected by the sale for taxes. While Judge Hitchcock, in his dissenting opinion, in that case, argued, that the tax sale, if valid and regular, could only be perfected and successfully asserted by a bill in chancery, against the patentee, charging him

as a trustee of the legal title. But there the patentee and the original purchaser of the land, to whom as the owner, it had been assessed for taxation, were one and the same person; and possibly he might be estopped as an execution defendant, from controverting a title acquired by judicial process against himself. Here, the heirs of Harrell were no parties to any such proceeding; and the patent was afterwards issued to them upon a claim distinct from, and hostile to that of Denton; and which in the act of issuance extinguished all pretence of title in him, either past or present.

On the whole, we submit that in every aspect of the case, the reasons are unanswerable in support of our position, that the sale for taxes, to the appellees, was null and void, and passed no title to them whatever.

If we are wrong in this conclusion, there is an end of the case for our clients. If we are right in it, there is an end of the case for the appellees. It is true that in 1848, they obtained a decree of confirmation, in an *ex parte* proceeding which they had instituted under the statute for that purpose. We need not argue before this court, that what is void, never can be made good by ratification, or have vitality imparted to it by any subsequent confirmation. A tax title which is merely irregular and voidable, may well be confirmed, if not contested. But where no title passed by the alleged tax sale, where the land in the condition it was in, was not subject to taxation; where the sale was made without authority of law, in derogation of the paramount sovereignty and right of disposal in the United States, and in violation of the compact between Arkansas and the General Government, surely the State court which passed the decree of confirmation, must have unwittingly proceeded to invest a nullity with any of the attributes of a perfect title.

So, the appellees have relied on the Statute of Limitations, to which there is a short answer. We need not calculate dates and ages upon this record, to see if by chance, some one or more of the heirs of Harrell, blessed with non-age, or favored by superior disabilities, may not yet be entitled to a modicum of this proper-

ty. If, as we contend, the tax title is void, there could be no constructive possession under or by virtue of it—taking that view of the case. On the other hand, conceding that the tax title, though avoided "into unavoidable voidness," might nevertheless afford color of title, in support of an actual adverse possession of the whole, or of a part, which would be co-extensive with that claim of title, still the case for the appellees is not aided; because it is admitted on this record, that the land in controversy is vacant, wild land, of which no one has ever been in actual possession. The only possible constructive possession of this land, in virtue of the legal title, has been in the heirs of Harrell, and those claiming under them, since the issuance of the patent in 1846.

The foregoing is the argument as presented to the Supreme Court of Arkansas. The case was decided by that Court, at May Term, 1860, and is reported, *Witherspoon et al. Exrs. vs. Duncan et al*, 21 *Arks. Rep.* 240. From the decision of that court the present writ of error is prosecuted to the Supreme Court of the United States, and with an abiding confidence that the positions contended for on behalf of these plaintiffs in error, are correct, and ought to have been sustained.

In the case of *Rector vs. the heirs of Ashley and Beebe et al.*, now pending before this court, I had occasion to argue, that on a writ of error from a Circuit Court of the United States, the whole record being open before this court, the opinion of the court below, or the grounds upon which the decision was based, whether upon a right or a wrong reason, or no reason at all, was not material; the only question being, whether the judgment appealed from was correct upon the record sent up. But that on a writ of error from a State Court, the jurisdiction of this Court being limited to a particular class of cases, it is essential to look into

the opinion of the State Court, in order to ascertain whether the case was decided upon a ground which would confer jurisdiction on this Court to review such decision, and which would not be shown by the judgment entry on the record, usually expressing in a few words, the final sentence or conclusion of law upon the case. Because, as in that case, (*Rector vs. Ashley's heirs*,) a question might be involved, which would confer jurisdiction on this court under the 25th section of the Judiciary Act, and yet the case be decided upon some other ground, exclusively cognizable before the State tribunals, and over which this court, according to its uniform rule of decision, would decline to assume jurisdiction. And especially ought that to be so in view of the Arkansas Law, where, by express Statute (*Digest, ch.* 146, Title "Reports of Supreme Court," p. 911,) the opinion of the court is made a part of the record in the particular case, and which is required to contain a full statement of the case, "so that the same "may be understood without reference to the record and pro- "ceedings in the same," and such opinion is to be published by the reporter without note or emendation, (other than head notes,) and which thus becomes an authentic exposition of the decision. And consequently if the opinion be omitted in the transcript sent here, there is either a diminution of the record apparent, for which this court should *ex-officio* award a *certiorari*, or else should look into the published report of the decision in order to determine any question of jurisdiction.

An examination of the decision in the present case, (21 *Arks. Rep.* 240,) will show a clear and undoubted jurisdiction in this court. The opinion of the Arkansas court is silent as to any question, that may be supposed to have been raised in the case, respecting the effect of the decree of confirmation, [for an illustration of which see *Parker and White vs. Overman*, 18 *Howard* 137,] of their alleged tax title procured by Duncan & Flanagin, the defendants in error, or respecting the Statute of Limitations set up in their answer, to the original bill. Nor indeed is there anything to be apprehended by the plaintiff's in error from these questions, which the Supreme Court of Arkansas wholly ignored

and virtually put out of the case. Because, if as contended for them, the tax sale of the land in controversy, was void for want of authority in the State Collector to sell, or in violation of the act of admission and articles of compact, between the United States and the State of Arkansas, the Supreme Court of Arkansas, would be bound to hold, that being void, it is not aided by a decree of confirmation—there being nothing to confirm. As for example, where the owner of the land had in fact paid the taxes, (*Wallace vs. Brown*, 22 *Ark.* 119,) or where for any other cause, the tax title, though purporting to be confirmed, is adjudged to have been void in its inception. And especially would that be so, in a case like the present, which is a direct proceeding to cancel the alleged tax title, and have it, as well as the pretended and *ex-parte* decree of confirmation, set aside.

So it would be, in regard to any supposed question of the Statute of Limitations. The land in controversy, being wild or unimproved and never in the actual possession of any body, the Supreme Court of Arkansas have uniformly held, that there can be no possession of it, except a constructive possession, and that goes with the title, wherever it may be. *Conway vs. Kinsworthy*, 21 *Ark.* 17; *Ledbetter vs. Fitzgerald*, 1 *Ark.* 448; *Wilson vs. Bushnell*, *ib.* 471; *Smith vs. Yell*, 8 *Ark.* 470.

Consequently, the Supreme Court of Arkansas based their decision, as they did, exclusively on the ground, that the tax sale under which the defendants in error, Duncan & Flanagin claimed, was valid, or in other words, was no violation of the compact between the State and the United States (Opinion p. 246,) citing *Carroll vs. Safford*, 3 *Howard* 400; *Astrom vs. Hammond*, 3 *McLean* 108, *&c.* In declaring such to be the law of the case, it is submitted, with profound respect for that court, there is in the opinion, an apparent "incomprehension," of the distinctions sought to be taken in the argument on behalf of the appellants, now again presented for the plaintiffs in error in this court, and to which but little remains to be added. That eminent court proceed to suppose the case of an ordinary cash entry (like that in *Carroll vs. Safford*,) and say that the purchaser is the beneficial

owner, liable for taxes, &c., before issuance of patent, and which when issued, relates back to the entry—that the fact, that an erroneous sale may be occasionally made, where the purchaser gets no title, is no valid objection to the power of the legislature to impose a tax upon lands, entered at the United States Land Offices, before the patents issue—that on principle if the United States disposes of her public land by a donation, the location makes the claimant the owner of the lands, and the results are the same as to beneficial ownership, and liability to taxes, &c.—and argue that, in the supposed case of a sale of the land under execution *against the heirs of Harrell*, [or that they had parted with their interest in it by contract,] it would be no defence *to them* to say that the lands were sold before the patent issued, &c.

Now, all that may be correct in the main, as general propositions of law, without touching the precise question presented—whether in this particular case, the result has been a violation of the *compact*, ordaining "that the General Assembly of the State "shall never interfere with the primary disposal of the soil within "the same by the United States, nor with any regulations Con- "gress may find necessary *for securing the title in such soil*, to "the bona fide purchasers thereof."

The point is that the donation claim of Harrell was proven up, and the application of his heirs to locate, in 1830, and the claim was not confirmed until 1846, when, or soon after the patent issued. For 16 years the United States by her lawfully constituted authorities in the General Land Office, from the President down, having by law and usage, and the regulations of the Land Department, a supervising controll over the subject matter, and a continuing power to disallow the claim, and a discretion to withhold a patent, stood in the attitude of opposing the claim of Harrell, and of refusing to recognize it as a valid claim, always of course as between the claimants and the United States, having the title and better right to the land. Not only so, but in the intermediate time, during these 16 years the same authorities of the United States, sold this land to Denton, received his money for it, and issued him a patent certificate, in consequence of

which, the sale being reported to the State Auditor, he caused the lands to be assessed for taxation to Denton, as the owner, and in consequence of his default, they were sold for the non-payment of the taxes, and purchased by the defendants in error.

The Arkansas court say that the naked legal title remains in the United States, until the patent issues, but the equitable title is in the purchaser, and when the patent issued it relates back to the entry—at the same time admitting that if the sale be illegal (as for example, where the land was by law reserved from sale,) and the entry set aside, a purchaser at a sale for taxes charged upon the land, would fail to get any title. And yet the case turned upon the assumption that because the heirs of Harrell had a claim, and which afterwards proved to be a valid one, to this land, they were bound to look after the payment of taxes on it, and had such an interest in it as might have been the subject of sale by them or under execution against them, and when the patent issued it related to the inception of their claim, and *enured to the benefit of the defendants in error*, who purchased the land at tax sale as the property of Denton.

The only theory upon which the decision in *Carroll vs. Safford* can rest, is that *for the purposes of taxation, the patent certificate is the patent*—thus steering entirely clear of any question as to whether the patent when issued, enures by estoppel against the patentee, in favor of the purchaser at tax sale. If the entry of Denton had stood, and the patent been issued to him, (instead, as the fact was, of its being set aside, and the purchase money received back by him,) the tax title of the defendants in error might well have been sustained upon the authority of that case. But before running wild with *Carroll vs. Safford*, within its scope a salutary concession to State sovereignty, it might be well again to recur to the grave considerations, urged in that case, by Mr. Attorney General Nelson, one of the great men of his day.

The decision sought to be reviewed on this writ of error, is probably the first instance in the history of the law, where the doctrine of relation, or any other legal fiction was ever invented or allowed to be used, as a means of working injustice, or bols-

tering up a hard and unconscionable claim, as that under a tax title, is by common consent taken to be. On the principle, that all property or right to property, in possession or expectancy, vested or contingent, may be the subject of contract and sale—else it would not be property—it may and doubtless would be true, that if the heirs of Harrell had sold their claim to this land, or it had been sold under execution of a judgment at law, which presupposed, and was the judicial ascertainment of a contract, before the issuance of the patent, the purchaser might be regarded as having a title by contract; and that being so, when the patent issued, a court of equity would treat the patentee as a trustee of the legal title, for the protection of his vendee, for whose benefit the after acquired title would enure. It could only so enure, by operation of estoppell, and no estoppell, ever was imagined, legal or equitable, that did not rest upon contract, express or implied.

A title or claim of title acquired at a tax sale, has in it no one of the elements of a title by contract, as between the owner or supposed owner and the purchaser at tax sale In a government of laws, taxes are the only instance and the exception, where private property can ever be taken for public use, without due compensation. They are imposed upon property against or without the will of the owner. This tremendous power is a governmental prerogative, and one of the highest attributes of soverignty. No attempt has ever been made to sustain the power to sell, save as an inference from the right to tax. The lurking fallacy in the opinion of the Supreme Court of Arkansas, stands exposed. If possibly there was a contract resulting from the duty of allegiance on the [redacted] of Denton to pay this tax, none such can be imputed by operation of estoppel to the heirs of Harrell, for whom it may be exclaimed *non in haec foederam veni*. It is remarkable, that the only ground upon which the opinion of the Supreme Court of Arkansas is predicated, is directly in the teeth of the decision of that Court in the somewhat noted case of *Crittenden vs. Johnson*, 14 *Ark.* 447, where the claim of a widow to dower, above all rights favored in law, was denied, when the sole ground

upon

of the general proposition that at the common law, "an after ac-
" quired title by a grantor, related to and perfected the title of
" his grantee, only where he had conveyed by deed with cove-
" nant of warranty." Moreover, the tie of loyalty, is no more binding on the subject than the duty of protection on the part of the soverign. When the State of Arkansas, assumed to sell these lands, on the first Monday in November, 1842, for alleged non-payment of taxes as the property of Denton, her executive, her judiciary, her legislature, all the combined elements and reserved rights of her sovereignty, wherever lodged, were powerless to protect or enforce any right of the heirs of Harrell to the lands in question, powerless to pronounce a favorable decision on their claim to a donation, or enforce the issuance of a patent to them.

Let it be conceded, that repeated adjudications have made it settled law in Arkansas, that a sale for non-payment of taxes, passes not the interest of any particular owner or claimant, whether adverse or in common, for life, or in remainder, but the property itself, and the entire fee, no matter who the owner may be, and constitutes a new starting point in the title, thus severing the gordian knot of prior controversy. Still the question remains to be responded to by this court of last resort, whether in November, 1842, there was any power in Arkansas to tax, any property for the tax to operate upon, or any title to be passed by a sale for alleged non-payment of the tax on the lands in question, according to the spirit of the compact, and without infringing upon the right of eminent domain in the United States, which was indeed before the compact, and independent of it.

Respectfully submitted,

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for Plaintiff in Error.